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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 295

[illegible] AIRCRAFT CORPORATION,
a California Corporation,
Appellant,

vs.

COUNTY OF SAN DIEGO, a Body Corporate, and CITY OF CHULA VISTA, a Municipal Corporation.

STATEMENT AS TO JURISDICTION ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

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San Diego 1, California

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STATEMENT AS TO JURISDICTION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No.

ROHR AIRCRAFT CORPORATION, a California Corporation, *Appellant,*

vs.

COUNTY OF SAN DIEGO, a Body Corporate, and CITY OF CHULA VISTA, a Municipal Corporation

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STATEMENT AS TO JURISDICTION

Appellant, Rohr Aircraft Corporation, in conformity with paragraph 2 of Rule 13 of the Revised Rules of the Supreme Court of the United States, herewith submits the statement as to jurisdiction in support of its appeal from the judgment of the Supreme Court of the State of California, noted below.

I.

OPINIONS BELOW

The opinions delivered by the courts below are as follows:

(a) *Rohr Aircraft Corporation* v. *County of San Diego and City of Chula Vista,* Supreme Court of the State of California,

L. A. 24556, filed March 17, 1959; ....Cal. 2d.........., 51 Advance California Reports 761; 336 P. 2d 521 (being Appendix A to this statement).

(b) *Rohr Aircraft Corporation* v. *County of San Diego and City of Chula Vista*, District Court of Appeal, Fourth Appellate District, Civil No. 5492, filed October 9, 1958; 164 Advance California Appellate Reports 94; 330 P. 2d 291 (being Appendix B to this statement).

(c) *Rohr Aircraft Corporation* v. *County of San Diego and City of Chula Vista*, December 11, 1956, in the Superior Court of the State of California, in and for the County of San Diego, No. 200839 (Reporter's Transcript, pages 249-254) (being Appendix C to this statement, in conformity with Rule 15-1-(h)). Also appended as Appendices D and E, respectively, are copies of the Findings of Fact and Conclusions of Law and of the Judgment of the trial court appealed from (Rule 15-1-(i)).

II.

GROUNDS FOR JURISDICTION

Jurisdiction of this Court is invoked upon the following grounds:

(a) This is an action by Appellant, as lessee of real property owned by the United States, to recover local property taxes assessed against the United States and paid by Appellant under the requirements of its lease. Claims for refund were filed with each taxing authority, under Section 5096 of the Revenue and Taxation Code of the State of California, and, upon denial of such claims, Appellant instituted this action under the authority of Section 5103 of the Revenue and Taxation Code of the State

of California. Appellant's action is predicted upon the proposition that the property leased by it was owned by the United States, and that the assessments were, therefore, erroneous and illegal under the Federal Constitution as interpreted by this Court. *M'Culloch* v. *The State of Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 29 L. Ed. 845, 6 S. Ct. 670; *United States* v. *County of Allegheny,* 322 U. S. 174, 88 L. Ed. 1209, 64 S. Ct. 908.

(b) The judgment sought to be reviewed is that of the Supreme Court of the State of California, which was entered March 17, 1959. Appellant thereafter filed a Petition for Rehearing, which was denied, April 15, 1959. The judgment of the Supreme Court of the State of California affirmed that of the trial court, in denying to Appellant a refund of the taxes sought to be recovered. Notice of Appeal to the Supreme Court of the United States was filed on June 12, 1959, with the Supreme Court of the State of California.

(c) Jurisdiction of the appeal is believed to be conferred on this Court by Subdivision (2) of Title 28, U. S. C., Section 1257.

(d) The cases which are believed to sustain the jurisdiction of this Court are *Standard Oil Co. of California* v. *Johnson,* 316 U. S. 481, 86 L. Ed. 1611, 62 S. Ct. 1168; *State Tax Commission of Utah* v. *Van Cott,* 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 358; *Minnesota* v. *National Tea Co.,* 309 U. S. 551, 84 L. Ed. 920, 60 S. Ct. 294.

(e) The issue in the cause involves the validity of the statutes of the State of California which, by its Constitution and provisions of its Revenue and Taxation Code, seriatim, provide for the taxation of all property located in the state, proportional to its value, which is not exempt from such taxation under the laws of

the United States. The statutes so involved are:

(1) The Constitution of the State of California, Article XIII, Section I, which provides in part:

> "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided . . ."

(2) The following are the sections of the Revenue and Taxation Code of the State of California (Deering's Revenue and Taxation Code of the State of California), under the authority of which were made the general levies constituting the taxes here sought to be recovered by Appellant:

§ "201. All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code." (Stats. 1939, Ch. 154, Sec. 201.)

§ "401. Except as provided in this part, all taxable property shall be assessed at its full cash value." (Stats. 1939, Ch. 154, Sec. 401.)

§ "404. All taxable property, except State assessed property, shall be assessed by the assessing agency of the taxing agency where the property is situated." (Stats. 1939, Ch. 154, Sec. 404.)

§ "405. Annually, the assessor shall assess all the taxable property in his county, except State assessed property, to the persons owning, claiming, possessing, or controlling it at 12 o'clock meridian of the first Monday in March. The as-

sess shall ascertain such property between the first Mondays in March and July." (Stats. 1941, Ch. 1240, Sec. 2.)

§ "601. The assessor shall prepare an assessment roll, as directed by the board, in which shall be listed all property within the county which it is the assessor's duty to assess." (Stats. 1939, Ch. 1008, Sec. 5.)

§ "602. This local roll shall show:

(a) The name and address, if known, of the assessee.

(b) Land, by legal description.

(c) A description of possessory interests sufficient to identify them.

(d) Personal property. A failure to enumerate personal property in detail does not invalidate the assessment.

(e) The cash value of real estate, except improvements.

(f) The cash value of improvements on the real estate.

(g) The cash value of improvements assessed to any person other than the owner of the land.

(h) The cash value of possessory interests.

(i) The cash value of personal property, other than intangibles.

(j) The revenue district in which each piece of property assessed is situated.

(k) The total taxable value of all property assessed, exclusive of intangibles.

(l) The actual value of solvent credits, after legal deductions for debts.

(m) Any other things required by the board." (Stats. 1939, Ch. 1008, Sec. 19.)

§ "611. If the name of an absent owner is known to the accessor, or in the case of real property, if it appears of record in the office of the county recorder, the property shall

be assessed to such owner; otherwise, the property shall be assessed to unknown owners." (Stats. 1941, Ch. 169, Sec. 1.)

§ "612. When a person is assessed as agent, trustee, bailee, guardian, executor, or administrator, his representative designation shall be added to his name, and the assessment entered separately from his individual assessment." (Stats. 1939, Ch. 154, Sec. 612.)

§ "613. A mistake in the name of the owner or supposed owner of real estate does not render invalid an assessment or any tax sale." (Stats. 1939, Ch. 154, Sec. 613.)

§ "2151. The board of supervisors shall fix the rates of county and district taxes and shall levy the State, county, and district taxes as provided by law." (Stats. 1939, Ch. 154, Sec. 2151.)

§ "2152. The auditor shall then:

(a) Compute and enter in a separate column on the roll the respective sums in dollars and cents, rejecting the fractions of a cent, to be paid as a tax on the property listed. Notwithstanding any contrary provisions elsewhere set forth in the law, all rates applicable to any assessment may be combined into a single figure for purposes of computation and extension of the roll.

(b) Place in other columns the respective amounts due in installments.

(c) Foot each column, showing the totals.

Provided, however, that if the assessment roll is a machine-prepared roll the above prescribed computations and entries may be made and entered upon a newly prepared roll which shall incorporate the adjustments authorized by the local board of equalization." (Stats. 1957, Ch. 321, Sec. 6.)

§ "2186. Every tax has the effect of a judgment against

the person." (Stats. 1939, Ch. 154, Sec. 2186.)

§ "2187. Every tax on real property is a lein against the property assessed." (Stats. 1939, Ch. 154, Sec. 2187.)

§ "2188. Every tax on improvements is a lein on the taxable land on which they are located, if they are assessed to the same person to whom the land is assessed." (Stats. 1939, Ch. 154, Sec. 2188.)

§ "2602. The tax collector shall collect all property taxes except as otherwise expressly provided." (Stats. 1939, Ch. 154, Sec. 2602.)

§ "2605. The following taxes on the secured roll are due November 1st:

(a) All taxes on personal property.

(b) Half the taxes on real property, and if the amount is not evenly divisible by two, the odd cent is also due unless the roll shows the odd cent as part of the second installment." (Stats. 1949, Ch. 246, Sec. 1.)

§ "2606. The second half of taxes on real property on the secured roll is due February 1st." (Stats. 1941, Ch. 1240, Sec. 5. 5; and Stats. 1953, Ch. 799, Sec. 1.)

§ "2607. The entire tax on real property may be paid when the first installment is due. The second installment may be paid separately only if the first installment has been paid." (Stats. 1941, Ch. 1240, Sec. 6.)

III.
QUESTIONS PRESENTED

The following questions are presented by this appeal:

(a) Where the Congress has, by express statute, waived the Constitutional immunity of the Federal Government from local

tax with respect to a property of a particular subsidiary (i.e., property of the Reconstruction Finance Corporation, 15 U. S. C. 607), and where the Congress has thereafter provided for the effectual transfer of such property to another agency created by it (War Assets Administration (Surplus Property Act of 1944, 58 Stat. 765, 50 U. S. C. A. Appendix, Sections 1611, et seq.)) and has not expressly extended the waiver of tax immunity to encompass the property of such new owning agency, are taxes imposed by a county, municipality, and other local taxing authorities, levied after the transfer accomplished under the congressionaly-prescribed mechanics, valid (*M'Culloch* v. *The State of Maryland*, 4 Wheat. 316, 4 L. Ed. 579)?

(b) Is it necessary for the Federal Government, in providing for transfers of federally-owned property, as between its various corporations and agencies, to comply with the common law concepts of conveyancing, so that such a transfer cannot occur in the absence of a formal deed, recorded in compliance with the local law?

(c) If the answer to the question posed in paragraph (b) above is negative, does the judgment of a state court, inferentially requiring compliance with local law, violate the supremacy clause of the Constitution of the United States (Article I, Section 8, Clause 18)?

(d) Can a state, by imposing its own views as to the requirements of property transfers between agencies of the Federal Government, notwithstanding the express provisions of the Federal Constitution (Article IV, Section 3, Clause 2), defeat the Constitutional immunity from local taxation which was waived by the Congress with respect to the original owning agency, but not with respect to the transferee agency?

IV.

STATEMENT OF THE CASE

Appellant, during 1951 to 1955, occupied property owned by the United States, under a lease in which the lessor was identified as "Reconstruction Finance Corporation". . . and the United States of America, both acting by and through the General Services Administrator." The real property and improvements involved had originally been acquired by the Defense Plant Corporation and thereafter were transferred to Reconstruction Finance Corporation. On May 29, 1946, Reconstruction Finance Corporation declared the property to be surplus to its needs and responsibilities, pursuant to the Surplus Property Act of 1944. Thereafter, the War Assets Administration accepted possession and control of the property, pursuant to the declaration made by RFC and the provisions of the Surplus Property Act. This possession and control continued through the period for which the taxes complained of by Apellant were levied and assessed. The functions of the War Assets Administration had, in the meantime, been transferred to the General Services Administration, pursuant to the provisions of the Federal Property and Administrative Services Act of 1949. No deed was executed by Reconstruction Finance Corporation at the time it executed and delivered the Declaration that the property was surplus to its needs. According to the records in the office of the County Recorder of San Diego County, legal title to the property remained in the Reconstruction Finance Corporation, until a deed, dated March 17, 1955, was recorded on May 6, 1955.

Notwithstanding the declaration of the property as surplus by Reconstruction Finance Corporation and the transfer of possession, control, and accountability by it to War Assets Admin-

istration, local property taxes were levied upon the property as though it were still owned by the Reconstruction Finance Corporation.

The only possible authority for such levies is contained in the provisions of the Reconstruction Finance Corporation Act (61 Stat. 205, 15 U. S. C. A. 607) which reads, so far as here applicable:

> "The Corporation, including its franchise, capital, reserves and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority, except that any real property of the Corporation shall be subject to special assessments for local improvements and shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The exemptions provided for in the preceding sentence with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with respect to the Corporation but also with respect to any other public corporation which is now or which may be hereafter wholly financed and wholly managed by the Corporation...."

In its Complaint, which was filed in the Superior Court of the State of California, in and for the County of San Diego, Appellant alleged that the property was "immune from taxation by State, County, Municipal, or local authorities, said immunity being provided by the Constitution and laws of the United States and of the State of California (Clerk's Transcript, page 2, line 24;

page 6, line 5)." It was further alleged that each of the assessments and tax levies complained of were "erroneous, illegal and void and in violation of the Constitution and laws of the United States and of the State of California (Clerk's Transcript, page 4, line 26; page 7, line 1)." The invalidity of the tax levies, made pursuant to the general property tax laws, was thus squarely raised, and the effect of the Constitutional immunity of federally-owned property was noted by the Trial Judge in his opinion delivered from the bench (Appendix C; Reporter's Transcript, pages 249-254). In the formal Findings of Fact and Conclusions of Law made by the trial court (Appendix D; Clerk's Transcript, pages 63-65), the Court found that Reconstruction Finance Corporation did not dispose of its legal title to the property until 1955, and that, at all times mentioned in the Complaint, it was the record owner and holder of legal title to the property, and that the taxes which were assessed, levied, and collected by Appellees were real property taxes properly levied under the provisions of the Reconstruction Finance Corporation Act (Title 15, United States Code Annotated, Section 607). Recovery of the taxes was, therefore, denied. By this action of the trial court, there was thus squarely drawn in question the validity of the statutes of the State of California on the ground of their being repugnant to the Constitution and laws of the United States, and the decision of the Court was in favor of their validity. *Standard Oil Co. of California* v. *Johnson,* 316 U. S. 481, 86 L. Ed. 1611, 62 S. Ct. 1168.

On the appeal, the District Court of Appeal, Fourth Appelate District, noted Appellant's contention that the taxes in question were illegal and void under the general rule that lands owned by the United States of America, or its corporate instru-

mentalities, are immune from state or local taxes and held that the property in question, during the years 1951 through 1955, was not "real property of the Corporation" within the meaning of the Reconstruction Finance Corporation Act, but rather was surplus property of the United States of America, and that the taxes were levied illegally (Appendix B; 164 Advance California Appellate Reports 94; 330 P. 2d 291.)

The Supreme Court thereafter granted a hearing and on such hearing, after considering Appellant's contention, affirmed the judgment of the trial court (Appendix A; 51 Advance California Reports 761; ....Cal. 2d........; 336 P. 2d 521).

Here then is real property admittedly acquired by an instrumentality of the United States — the Reconstruction Finance Corporation. The Congress, with respect to property of that Corporation, waived Constitutional immunity from local taxation. Thereafter, under mechanics adopted by the Congress in the Surplus Property Act of 1944, the Reconstruction Finance Corporation effectively, and with all incidents of ownership (other than bare legal title), transferred the property to War Assets Administration, and that agency assumed possession and control over the property and, indeed, purported to exercise all rights with respect to it. During the time that it was under the possession and control of the General Services Administrator (as successor to the War Assets Administrator), local taxes were levied upon the property as though it still belonged to Reconstruction Finance Corporation. The validity of such taxes was upheld by the State of California, upon the ground that no effectual transfer had occurred to War Assets Administration from RFC. The decision of the Supreme Court of California upholding the validity of the tax levies clearly drew into question the validity of the statutes

under which those levies were made. The taxes were attacked on the ground that they were imposed in violation of Federal Constitutional immunity. The decision of the trial court affirmed by the Supreme Court of California was in favor of the taxes, thus upholding the validity of the statutes under which they were levied.

However, should it be felt that the proper mode of review upon the federal questions presented by this appeal is by petition for certiorari, it is respectfully requested that this statement and the record brought up concurrently herewith be regarded and acted on as a petition for Writ of Certiorari, and as if such petition were duly presented to this Court at the time the appeal was taken.

V.

SUBSTANTIAL FEDERAL QUESTIONS ARE RAISED

This case, involving as it does one of the facets of intergovernmental tax immunities, presents in several different ways unsettled and undetermined questions of federal law. It should be noted at the outset that the taxes levied were not on any interest of Appellant in the property under its lease. Appellant has conceded the tax liability of its possessory interest. Compare *United States* v. *Township of Muskegon*, 355 U. S. 484, 2 L. Ed. 2d 436, 78 S. Ct. 483; *United States* v. *Detroit*, 355 U. S. 466, 2 L. Ed. 2d 424, 78 S. Ct. 474; *United States* v. *County of Allegheny*, 322 U. S. 174, 88 L. Ed. 1209, 64 S. Ct. 908.

The precise question here raised was decided by the Court of Claims of the United States in accordance with the contention of Appellant. *Board of County Commissioners of Sedgwick*

County, Kansas v. *United States* (1952, 105 Fed. Supp. 955). There the Court of Claims stated:

> "The law did not require that the RFC execute a deed of the property upon its transfer to the control of the WAA, and the RFC continued after April 16, 1947, as the 'owning agency' within the meaning of the Surplus Property Act—apparently as a matter of convenience to the government and to minimize actual paper work and expense until the WAA made final disposition of the property. While a bare legal title for the use of the United States may have thus remained in the RFC from April 16, 1947, until February 25, 1948, when the property was transferred to the Department of the Air Force, nevertheless the entire responsibility for the care and handling, and disposition of the property was in the WAA during that period. *United States* v. *Shofner Iron & Steel Works*, 9 Cir., 168 F. 2d 286, 287.
>
> "The waiver of constitutional immunity from taxes on 'real property of the Corporation' enacted with respect to the RFC in 1932, 47 Stat. 10, was undoubtedly intended to apply to that real property of the corporation held by it in the performance of the duties and responsibilities imposed upon it by law. But by the . . . declaration of the property as surplus under the Surplus Property Act, 58 Stat. 765, enacted some 12 years after 47 Stat. 10, RFC declared that the property was surplus to its 'needs and responsibilities,' and . . . was divested of all control and responsibility. At no time after the acceptance by the WAA . . . did the RFC or any of its employees have physical possession, control, or custody of the property. It had neither the use nor the right to use the property. It could not even withdraw the declaration of surplus property without the approval of the War Assets Administrator, 32 C. F. R., 1946 Supp. 8301.5(b).
>
> "There is no indication that Congress intended to waive immunity from taxation under these circumstances . . . Such a situation could not even have arisen at the time the waiver provision was enacted, and was made possible only by the enactment of the Surplus Property Act some 12 years later.

The purpose of the waiver provision had been fully served when the property passed to the control of the WAA.

"Upon consideration of these factors we cannot presume that Congress intended the waiver provision with respect to 'real property of the Corporation' to extend to the lands in question after they passed to the responsibility and authority of the WAA. . . . Thus we hold that the cloak of immunity descended upon the property on that day and no tax liability for the property could arise thereafter."

However, the Supreme Court of Michigan, in the case of *Continental Motors Corporation* v. *Township of Muskegon* (1956, 346 Mich. 141, 77 N. W. 2d 370), came to an opposite conclusion on similar facts and held that local taxes levied upon the facilities there involved were valid, even though Reconstruction Finance Corporation had, in that case also, declared the property surplus to its needs, and such property had, as in the case at bar, been transferred under the Surplus Property Act to the War Assets Administration.

The Supreme Court of California chose, in this case, to follow the Supreme Court of Michigan.

The taxes here levied can be upheld only if the provisions of the Federal Constitution giving Congress the power "to dispose and make all needful rules and regulations respecting the territory or other property belonging to the United States" (Article IV, Section 3, Clause 2) is to be ignored, and the several States permitted to determine for themselves the rules under which federal property can be transferred from one federal instrumentality to another. It has been stated by this Court that the power over federal property given Congress by the Constitution is without limitation. *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275, 2 L. Ed. 2d 1313, 78 S. Ct. 1174; *United States* v. *County of Allegheny*,

322 U. S. 174, 88 L. Ed. 1209, 64 S. Ct. 908; *United States* v. *San Francisco,* 310 U. S. 16, 84 L. Ed. 1050, 60 S. Ct. 749.

That this cause turns upon a federal question cannot be denied. Indeed, the Supreme Court of California throughout its opinion (Appendix A) recognized that it was deciding a question of federal law. It should be noted, in addition, that the very provisions of the California Constitution, in Section 1 of Article XIII, recognize the applicability of federal law:

> "All property in the State except as otherwise in this Constitution provided, *not exempt under the laws of the United States,* shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided." (Emphasis supplied.)

However, in deciding federal law as applied in this case, the California Court has in effect ruled that the Congress of the United States may not arrange for the transfer of federally-owned property from one of its creatures to another, without complying with the common law concepts of conveyancing and has held that no transfer can occur in the absence of a formal deed, recorded in compliance with local law.

Throughout the history of this country, the problem of Federal-State relationship and the proper sphere of activity for each has remained alive and fluid. Intergovernmental tax immunity is but a phase of this problem which both early and late has concerned this Court. But the ultimate question of policy is for Congress. Its determination of the policy which best serves the national interest should only be undertaken in the light of a firm and sure definition of the rules governing the transfer and disposition of properties from one governmental agency to another. The right of the Congress to legislate on the manner in which

federal property is handled or transferred should be clearly defined. Constitutional immunity of the Federal Government from local taxation should be so buttressed that it cannot be defeated by State action taken in the light of local self interest. If Congress should elect to waive such immunity with respect to a particular class of federally-owned property, the rules surrounding that waiver must be so circumscribed that the original Congressional intent cannot be expanded by State action alone. The Supreme Courts of both Michigan and California have chosen to so interpret federal law as to preserve the right of those States to tax federal property. Their decisions in this regard are directly contra to the view expressed by the United States Court of Claims in the case noted above. The resolution of this conflict presents a question of paramount importance.

It is, therefore, respectfully requested that the Court enter its order noting probable jurisdiction in the cause here presented, and that the matter thereafter be heard and considered on its merits.

Respectfully submitted,

LEROY A. WRIGHT,
Attorney for Appellant.

APPENDIX A

IN THE

SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

ROHR AIRCRAFT CORPORATION,
Plaintiff and Appellant,
vs.
COUNTY OF SAN DIEGO, a Body Corporate, and CITY OF CHULA VISTA, a Municipal Corporation,
Defendants and Respondents.

L. A. 24556
FILED
Mar. 17, 1959
William I. Sullivan, Clerk
By ____________

Plaintiff, Rohr Aircraft Corporation, sought to recover property taxes paid to the defendants County of San Diego and City of Chula Vista under allegedly illegal assessments. From a judgment denying a refund, plaintiff appeals.

During the years for which recovery is sought, plaintiff occupied the land in question under a lease obligating it to pay "all taxes, assessments and similar charges . . . upon the leased premises." Plaintiff's lessors were the "Reconstruction Finance Corporation . . . and the United States of America, both acting by and through the General Services Administrator." While plaintiff concedes the taxability of its possessory interest, it maintains that taxes levied upon the realty itself were unlawful because of the general rule that lands owned by the United States of Amer-

ica or its instrumentalities are immune from state and local taxation. (Clallam County v. United States, 263 U.S. 341; Van Brocklin v. State of Tennessee, 117 U.S. 151.) Defendants argue, however, that the property was owned by the Reconstruction Finance Corporation, that Congress had waived the tax immunity of such property (Reconstruction Finance Corporation Act, ch. 166, § 8, 61 Stat. 205 (1947), as amended, 15 U.S.C.A. § 607 (1948) (formerly Reconstruction Finance Corporation Act, ch. 8, § 10, 47 Stat. 9 (1932))), and that the assessments were therefore lawful.

In 1942 and 1943, plaintiff's predecessor, also named Rohr Aircraft Corporation, conveyed the property in question to the Defense Plant Corporation, a subsidiary of the Reconstruction Finance Corporation (hereinafter sometimes referred to as the RFC). The Defense Plant Corporation improved the property and leased it to plaintiff's predecessor for the production of aircraft parts and assemblies during World War II. On July 1, 1945, the Defense Plant Corporation was dissolved and all its assets were transferred to the RFC by operation of law. (Act of June 30, 1945, ch. 215, 59 Stat. 310, 15 U.S.C.A. § 611, n. (1948).) In October, 1945, the lease was terminated at Rohr's request, and there was evidence that the company then vacated the premises. On May 29, 1946, the RFC declared the property to be surplus to its needs and responsibilities pursuant to the Surplus Property Act of 1944. (§ 11, 58 Stat. 769.) Later in the year the War Assets Administration, a federal instrumentality designated as a surplus property disposal agency (see Surplus Property Act of 1944, ch. 479, § 10(a), 58 Stat, 769), accepted possession and control of the property pending its ultimate disposition. No deed was executed at that time, and legal title re-

mained in the RFC. The functions of the War Assets Administration were subsequently transferred to the General Services Administration. (Federal Property and Administrative Services Act of 1949, ch. 388, § 105, 63 Stat. 381, 5 U.S.C.A. § 630c (Supp. 1958).)

In May, 1948, the former Rohr Aircraft Corporation began renting portions of the property on a month-to-month basis, and in September, 1949, its successor, the plaintiff, obtained the abovementioned lease of the entire property. In accordance with its terms, plaintiff paid taxes on the land pursuant to defendants' assessments against the RFC as record owner for the fiscal years 1951-1952 through 1954-1955. In 1955 the RFC conveyed its interest to the United States.

Plaintiff's right to recover the amounts so paid depends on whether the leased premises were immune from local taxation or whether Congress had waived the federal immunity. The waiver in question provides, "[A]ny real property of the [Reconstruction Finance] Corporation . . . shall be subject to . . . county, municipal or local taxation to the same extent according to its value as other real property is taxed." (Reconstruction Finance Corporation Act, ch. 166, § 8, 61 Stat. 205 (1947), as amended, 15 U.S.C.A. § 607 (1948) (formerly Reconstruction Finance Corporation Act. ch. 8, § 10, 47 Stat. 9 (1932)).) Before the RFC's surplus property declaration, this statute unquestionably subjected the land to local taxes. (Reconstruction Finance Corp. v. Beaver County, 328 U. S. 204; Boeing Aircraft Co. v. Reconstruction Finance Corp., 25 Wash. 2d 652 [171 P. 2d 838], appeal dismissed and cert. denied, 330 U.S. 803.) Its taxable status was not changed by the mere declaration that it was surplus to the RFC's needs and responsibilities. (Board of County

Com'rs of Sedgwick County v. United States, 105 F. Supp. 995, 1001.) Thus the sole question for determination is whether the land ceased to be "real property of the" Reconstruction Finance Corporation when control and responsibility were subsequently transferred to the War Assets Administration. The identical question has been presented in two previous cases.

In Board of County Com'rs of Sedgwick County v. United States, supra. 105 F. Supp. 995, the Court of Claims held that RFC surplus property was immune from local taxes once the War Assets Administration had accepted control of and accountability for the property. The court reasoned that "the waiver of constitutional immunity from taxes . . . was undoubtedly intended to apply to that real property of the corporation held by it in the performance of the duties and responsibilities imposed upon it by law. But by the . . . declaration of the property as surplus . . . the RFC declared that the property was surplus to its 'needs and responsibilities', and by . . . acceptance [of the War Assets Administration] was divested of all control and responsibility. At no time after the acceptance by the WAA . . . did the RFC or any of its employees have physical possession, control, or custody of the property. It had neither the use nor the right to use the property. It could not even withdraw the declaration of surplus property without the approval of the War Assets Administrator." (Id. at 1001.) Although the court recognized that the RFC continued to be the "owning agency" within the meaning of the Surplus Property Act (§ 3 (b), 58 Stat. 767), it viewed the RFC as holding no more than "a bare legal title for the use of the United States." (105 F. Supp. at 1001; see United States v. Shofner Iron & Steel Works, 9 Cir., 168 F. 2d 286.) On the basis of this reasoning and the assumption that the RFC omitted to trans-

fer title merely "as a matter of convenience to the Government and to minimize actual paper work and expense" (105 F. Supp. at 1001), the court concluded that "the purpose of the waiver provision had been fully served when the property passed to the control of the WAA." (Id. at 1001-1002.)

In Continental Motors Corporation v. Township of Muskegon, 346 Mich. 141 [77 N. W. 2d 370], the Supreme Court of Michigan rejected the reasoning of the Sedgwick case and came to an opposite conclusion on similar facts. The court declared that the Congressional waiver of immunity "was intended to prevent prejudice to local economic conditions" and that the reason for the waiver persisted during the disposal process where the use of the property remained unchanged. (Id. at 149-150.) We are in accord with the result reached by the Supreme Court of Michigan in the cited case.

In providing for taxation of "real property of the" RFC, Congress must have intended to insure that RFC ownership of property would not withdraw important revenue sources from the local tax rolls. By enacting the Surplus Property Act of 1944 (58 Stat. 765), Congress expressed its desire to maintain competition, "to avoid disolcations of the domestic economy," and "to prevent . . . unusual and excessive profits being made out of surplus property." (58 Stat. 766.) These objectives are inconsistent with the asserted intent that RFC surplus property should be immune from taxation during the disposal process. While some of that property was ultimately to be transferred to tax-exempt entities such as federal agencies, local and state governments, and charitable organizations (58 Stat. 770-772), it was also anticipated that much of it would be returned to private hands. (58 Stat. 773-779.) Since RFC property was taxable at all

times before it became surplus to the needs of the RFC, and since much of that property was destined to be sold to private persons and thereafter to be subject to local taxes, it cannot be held that Congress intended such property to be immune from taxation during the disposal process. Moreover, it appears that the disposal agencies, acting under similar reasoning, left legal title in the RFC not merely as a "matter of convenience," as the Court of Claims assumed, but for the sole purpose of continuing the tax immunity waiver until final disposition of the property. (See 32 Decs. Comp. Gen. 164, 166; Hearings on Amendment to the Federal Property and Administrative Services Act of 1949, as Amended, Before the House Committee on Government Operations, 84th Cong., 1st Sess. 126.) We conclude that the property did not become immune from local taxes until legal title was transferred to the United States in 1955, and that plaintiff is therefore not entitled to a refund of the amounts paid. (Cal. Const., art. XIII, § 1; see Boeing Aircraft Co. v. Reconstruction Finance Corp., supra, 25 Wash. 2d 652,, 663 [171 P. 2d 838, 845], appeal dismissed and cert. denied, 330 U.S. 803.)

Plaintiff contends, however, that we must reverse the judgment on the authority of the Sedgwick case, supra. 105 F. Supp. 995, even though we disagree with the decision of the Court of Claims. It is true that we are bound by interpretations of federal statutes by the United States Supreme Court. (U.S. Const., art. VI, § 2.) In our opinion, however, the decisions of the lower federal courts on federal questions are merely persuasive. (See Stock v. Plunkett, 181 Cal. 193, 194-195; Continental Motors Corp. v. Township of Muskegon, supra, 346 Mich. 141 [77 N.W. 2d 370]; State ex rel. St. Louis, V. & M. Ry. v. Taylor, 298 Mo. 474, 489-490 [251 S.W. 383, 387], aff'd, 266 U.S. 200; Note,

147 A.L.R. 857; 21 C.J.S. Courts § 206, p. 365.) Although the parties have cited no decision of the United States Supreme Court directly passing upon the point, plaintiff argues that in any event our own decisions require us to follow the Court of Claims. Plaintiff relies on general statements to the effect that this court must accept the construction placed upon federal statutes by the federal courts. Those statements were made, however, either in the light of controlling United States Supreme Court decisions (In re Hallinan, 43 Cal. 2d 243, 250-252; Mackenzie v. Hare, 165 Cal. 776, 779, 785) or in cases where this court had no disagreement with the position taken by the lower federal courts. (Penn. R.R. Co. v. Midstate etc. Co., 21 Cal. 2d 243, 245; Dougherty v. California Kettleman, etc., 9 Cal. 2d 58, 88-89.)

Where lower federal court precedents are divided or lacking, state courts must necessarily make an independent determination of federal law. Any rule which would require the state courts to follow in all cases the decisions of one or more lower federal courts would be undesirable, as it would have the effect of binding the state courts where neither the reasoning nor the number of federal cases is found persuasive. Such a rule would not significantly promote uniformity in federal law, for the interpretation of an act of Congress by a lower federal court does not bind other federal courts except those directly subordinate to it. (United States v. Cincotta, 146 F. Supp. 61, 62; General Electric Co. v. Refrigeration Patents Corp., 65 F. Supp. 75, 81; United States v. St. Clair, 62 F. Supp. 795, 797; see also Rule 19, Revised Rules of the Supreme Court, § 1(b).) We therefore conclude that the courts of this state may decline to follow the decision of the Court of Claims, as the reasoning of that decision is not persuasive.

The judgment is affirmed.

SPENCE, J.

WE CONCUR:

GIBSON, C. J.

SHENK, J.

TRAYNOR, J.

SCHAUER, J.

Rohr Aircraft Corp. v. County of San Diego *L.A. 24556*

DISSENTING OPINION

I dissent. I would reverse the judgment for the reasons stated by Mr. Justice Coughlin in the opinion prepared by him for the District Court of Appeal in Rohr Aircraft Corp. v. County of San Diego, 164 A.C.A. 94, 330 P. 2d 291.

McCOMB, J.

APPENDIX B

IN THE

DISTRICT COURT OF APPEAL

FOURTH APPELLATE DISTRICT,

STATE OF CALIFORNIA

CIVIL NO. 5492

ROHR AIRCRAFT CORPORATION,
a California Corporation,

Plaintiff and Appellant,

vs.

COUNTY OF SAN DIEGO, a Body Corporate, and CITY OF CHULA VISTA, a Municipal Corporation,

Defendants and Respondents.

Dist. Court of Appeal—
Fourth Dist.

FILED
Oct. 9, 1958

E. J. Verdeckberg, Clerk

OPINION

Appeal from a judgment of the Superior Court of San Diego County, Arthur L. Mundo, Judge. Reversed with directions.

Action to obtain refund of tax payments.

Glenn & Wright for Appellant.

James Don Keller, District Attorney and County Counsel of San Diego County; Carroll H. Smith, Deputy; and Manuel L. Kugler, City Attorney of the City of Chula Vista, for Respondents.

This is an action to recover taxes paid by appellant, Rohr Aircraft Corporation, to the respondents, County of San Diego and City of Chula Vista, under an alleged illegal assessment.

During the years 1951 to 1955, inclusive, appellant occupied certain land and improvements, adjoining its plant in Chula Vista, under a written lease dated September 1, 1949, between "Reconstruction Finance Corporation . . . and the United States of America, both acting by and through the General Services Administrator" as lessor, and said Rohr Aircraft Corporation, as lessee. By the provisions of this lease the lessee agreed to pay "all taxes, assessments and similar charges . . . taxed, assessed or imposed upon lessor or lessee with respect to or upon the leased premises." For the fiscal years 1951-1952, through 1954-1955, the Rohr Aircraft Corporation paid taxes levied by respondents upon the leased premises, pursuant to assessments thereon against Reconstruction Finance Corporation, which was a federal agency.

Thereafter, Rohr Aircraft Corporation duly presented to the proper authorities claims for a refund of the amounts so paid, contending that the taxes levied against the property were illegal and void; the claims were denied; this action was instituted to recover the payments; judgment denying recovery was rendered; and from this judgment the corporation has appealed.

This case does not involve the taxation of the possessory interest of the lessee under the aforesaid lease. At the trial it was stipulated that any refund would be subject to an offset for taxes against such possessory interest, in accord with a formula agreed upon by the parties.

Appellant contends that the taxes in question were illegal and void under the general rule that, lands owned by the United States of America, or its corporate instrumentalities, are immune from State or local taxes. (*M'Culloch v. Maryland*, 4 Wheat 316, 4 L. Ed. 579; *Van Brocklin v. Anderson, Com'r of Revenue*, et al, 117 U. S. 151, 6 S. Ct. 670; *Clallam County, Wash. v. United*

States, 263 U. S. 341, 44 S. Ct. 121; *Gottstein v. Adams*, 202 Cal. 581, 584.) Excepted from this immunity are those lands which Congress has consented may be subject to such taxation. (*Western L. Co. v. State Bd. of Equalization*, 11 Cal. 2d 156, 158.) Respondents contend that the property in question comes within the exception; that it was owned by the Reconstruction Finance Corporation; that the Reconstruction Finance Corporation Act expressly subjects it to local taxation (Act Jan. 22, 1932, sec. 8, as amended, 47 Stat. 10, 15 U. S. C. A. Sec. 607); and that it was legally taxed. (Art. XIII, Sec. 1, Calif. Const.; *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, 25 Wash. 2d 652, 171 P. 2d 838, 842, 845.)

The congressional waiver of immunity in question was expressed in the following terms: ". . . Any real property *of the* corporation shall be subject to . . . county, municipal, or local taxation to the same extent according to its value as other real property is taxed." (Act Jan. 22, 1932, sec. 8, as amended, 47 Stat. 8, 15 U.S.C.A. Sec. 607.) (Italics ours.)

The issue for determination on appeal is whether the premise described in the aforesaid lease constituted real property "of the" Reconstruction Finance Corporation, within the meaning of said section 8 of the Act, during the time the taxes in question were levied. A decision upon this issue necessitates a consideration of the factual and legal background involved.

In 1942 and 1943, a former Rohr Aircraft Corporation, the predecessor of appellant, by grant deeds, conveyed the real property in question to the Defense Plant Corporation, a federal agency. This agency improved the property and leased it to the grantor corporation for use during World War II. In June, 1945, the Defense Plant Corporation was dissolved and all of

its assets were transferred to Reconstruction Finance Corporation, mother federal agency. (Act June 30, 1945, c. 215, 59 Stat. 310, 15 U.S.C.A. Sec. 611(n).) It does not appear that the transfer of title to the real property was effected by the execution of a deed. On October 15, 1945, the lease by Defense Plant Corporation to Rohr Aircraft Corporation was terminated; the premises were vacated by the lessor; and the property was turned over to the Reconstruction Finance Corporation. On May 29, 1946, the latter corporation declared the premises to be surplus property under the Surplus Property Act of 1944. (Act October 3, 1944, c. 479, 58 Stat. 765, 50 U.S.C.A. secs. 1611, et seq.) In the latter part of the same year the War Assets Administration, a federal instrumentality designated as a disposal agency to accept property declared to be surplus under that Act, took possession of the premises and thereafter used them as a storage facility and sales center for surplus property. No deed was executed transferring title.

The declaration by the Reconstruction Finance Corporation and acceptance of the property by War Assets Administration were done pursuant to the provisions of the Surplus Property Act of 1944, as amended and then existing, under which that corporation, and similar government agencies, had "the duty and responsibility continuously to survey the property in its control and to determine which of such property (was) surplus to its needs and responsibilities" (Act October 3, 1944, c. 479, sec. 11, 58 Stat. 769, 50 U.S.C.A. sec. 1629.); and was required to promptly report to the War Assets Administration, which then was the appointed disposal agency, all such surplus property in its control not disposed of under specific authorization inapplicable to the present situation. (Ibid. sec. 1620(c).) The report in question was

filed on a prescribed form entitled "Declaration of Surplus Real Property." When any surplus property was so reported the disposal agency had the "responsibility and authority for the disposition of such property, and for the care and handling of such property pending its disposition, in accordance with regulations prescribed by the War Assets Administrator." (Ibid. sec. 1620 (d).) The statute also provided that the "disposal agency may execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act and, in the case of surplus property, shall do so to the extent required by the War Assets Administrator". (Act October 3, 1944, c. 479, sec. 15, as amended, 58 stat. 772, 50 U.S.C.A. Sec. 1624(b).)

The War Assets Administration occupied the premises in question exclusively during the year 1947 and the first part of 1948. The Rohr Aircraft Corporation did not occupy the property from October 15, 1945, when its lease with Defense Plant Corporation was terminated, until May, 1948, when it began renting parts thereof on a month to month basis. Subsequent negotiations with the War Assets Administration resulted in extending the areas of occupancy from time to time, and the execution of interim leases on a month to month basis, to cover such extensions. Further negotiations with War Assets Administration culminated in the execution of the lease of the whole property to appellant, the present Rohr Aircraft Corporation, by the General Services Administrator acting for the Reconstruction Finance Corporation and the United States of America. This is the lease of September 1, 1949, under which the tax payments in question were made.

In the meantime Congress had repealed parts of the Surplus Property Act of 1944, and enacted the Federal Property and Administrative Services Act of 1949 (Act June 30, 1949, c. 288, 63 Stat. 378, 41 U.S.C.A. secs. 201, et seq., which, in 1950, were transferred to titles 5 and 40 U.S.C.A. and renumbered) which created a General Services Administration and an Administrator of General Services (Act June 30, 1949, Title I, sec. 101, 63 Stat. 379, 41 U.S.C.A. sec. 211); transferred the functions, property and commitments of War Assets Administration to the General Services Administration, and the functions of the War Assets Administrator to the Administrator of General Services (Act June 30, 1949, c. 288, Title I, sec. 105, 63 Stat. 381, 41 U.S.C.A. sec. 215); authorized the Administrator to delegate his functions, or those of the administration, to other executive agencies (Act June 30, 1949, c. 288, Title II, sec. 205, 63 Stat. 389, 41 U.S.C.A. sec. 235); directed that all policies, procedures and directives theretofore prescribed, with respect to surplus property, should remain in full force and effect until superseded (Act June 30, 1949, c. 288, Title VI, sec. 601, 63 Stat. 399, 41 U.S.C.A. sec. 203); provided that "The Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in our pursuant to this chapter. The care and handling of surplus property, pending its disposition, and the disposal of surplus property, may be performed by the General Services Administration or, when so determined, by the Administrator, (or) by the executive agency in possession thereof . . . any executive agency designated or authorized by the Administrator to dispose of surplus property may do so by sale, exchange (or) lease

. . . upon such terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or other interest in property, . . . as it deems necessary . . ." (Act June 30, 1949, c. 288, Title II, sec. 203, 63 Stat. 385, 41 U.S.C.A. sec. 233); also provided that where disposition of surplus property "has been by lease . . . the Administrator shall administer and manage such . . . lease . . . and may enforce, adjust, and settle any right *of the Government* (not of the Reconstruction Finance Corporation) with respect thereto in such manner and upon such terms as he deems in the best interest *of the Government*" (Act June 30, 1949, c. 288, Title II, sec. 204, 63 Stat. 388, 41 U.S.C.A. sec. 234); and directed the Administrator to "advise and consult with interested federal agencies with a view to obtaining their advice and assistance in carrying out the purposes of this chapter." (Act June 30, 1949, c. 288, Title II, sec. 205, 63 Stat. 389, 41 U.S.C.A. sec. 235.) (Italics ours.)

The lease of September 1, 1949, states that the lessors, Reconstruction Finance Corporation *and* the United States of America are "both acting by and through the General Services Administrator under and pursuant to the powers and authority contained in the provisions of the Federal Property and Administrative Services Act of 1949, and the Surplus Property Act of 1944"; recites that the premises therein described have been declared "surplus property *of the Government* of the United States", and are included "in the types of surplus property which *have been assigned* to War Assets Administration for disposal"; and that the "Department of Air Force had determined that the use of the leased premises by the lease herein is necessary for the production of military equipment for the National Defense"; and is signed by a director of disposals of War Assets Administration under a dele-

gation of authority from War Assets Administration, which authorized him "to execute . . . any . . . lease . . . or other instrument in writing in connection with the care, handling and disposal of surplus real property . . . and do . . . any other act necessary to effect the transfer of title to any such surplus real . . . property . . ." (Italics ours.)

On March 17, 1955, which was after levy of the taxes under consideration in this case, the Reconstruction Finance Corporation, by a quitclaim deed, conveyed any interest it might have in the property in question to the United States of America.

Appellant contends that, upon the filing of the surplus property declaration and the entry into possession by War Assets Administration, the land and improvements under discussion ceased to be "real property of the" Reconstruction Finance Corporation within the meaning of the statute subjecting such property to taxation by local governments.

Respondents contend that this land and improvements continued to be subject to local taxation until execution of the quitclaim deed on March 17, 1955, and cite the case of *Continental Motors Corporation v. Township of Muuskegon* [1956] 346 Mich. 141, 77 N. W. 2d 370, in support of their contention. The facts of the cited case, although similar, are not identical to those in the case at bar. In the Michigan case the Defense Plant Corporation built a plant which was transferred to Reconstruction Finance Corporation by operation of law; the latter corporation declared the property surplus and it was accepted by War Assets Administration in June, 1948. Upon the dissolution of its subsidiary, which was some considerable time prior to the surplus property declaration, the Continental Motors Corporation had commenced its occupation of the property under a lease to the

subsidiary from the Defense Plant Corporation and, as related by the court, "such use and occupancy has continued to the present time. The record does not indicate that any material change in operations has taken place." (Ibid. 77 N. W. 2d 370, 372.) Although a lease dated April 1, 1949, by Reconstruction Finance Corporation, acting "by and through the War Assets Administrator", to Continental Motors Corporation, was surrendered as of November 1, 1950, from the foregoing statement by the court, and the fact that the latter corporation sought a refund of taxes assessed for the year 1953, we must conclude that it remained in continuous possession. In holding that the property there in question was subject to local taxation under section 8 of the Reconstruction Finance Corporation Act, the Michigan Supreme Court relied upon its finding that Congress consented to local taxation of federal property for the public good; "to prevent prejudice to local economic conditions" and a realization of the hardship resulting from the removal of such property from the tax rolls which is "embarrassing to the functioning of local governments, and results in throwing a heavy burden on taxpayers generally", (Ibid. 77 N. W. 2d 370, 374) and, respecting the case before it, stated that "Declaring the property in question to be surplus did not operate to change the general purpose or character of its use. It continued to be occupied by Continental Motors as lessee, and that corporation continued to carry out the operations indicated by the agreements made by it with the Federal government through the latter's agencies. No reason is apparent why the waiver of immunity should have been terminated at that time. From the standpoint of local economy and well-being precisely the same reasons existed as during the prior years when it was assessed under the State law and taxes were paid without

question". (Ibid. 77 N. W. 2d 370-374). The same argument would support the obviously untenable contention that the property was taxable even though, coincidentally with its surplus property declaration, the Reconstruction Finance Corporation had executed a deed conveying it to the United States of America. The real question for determination in the cited case, as in the case at bar, was whether the property had ceased to be "real property of the corporation", within the meaning of the Act which subjects it to local taxation at the time of the levy under consideration.

Equally nonresponsive to the determinative issue was the Michigan court's consideration of the intention of Congress concerning the effect of the Surplus Property Act of 1944 on the provisions of said section 8 of the Reconstruction Finance Corporation Act, and its conclusion that "The waiver of immunity from taxation involved in the instant case came into being by express action of Congress. It is, we think, inconceivable that that body contemplated the revocation of such waiver by mere implication". (Ibid. 77 N. W. 2d 370, 376). Respondents, relying on the cited case, contend that this court must determine whether or not there is an implied repeal of the express congressional consent to levy a local tax on real property of the Reconstruction Finance Corporation when it is declared surplus and custody thereof transferred to the War Assets Administration. It is our opinion that no question of an "implied repeal" is involved in the decision of this case.

The tax levies under consideration here were made against surplus real property which had been disposed of by a lease made pursuant to the provisions of the Federal Property and Administrative Services Act; the terms and conditions of which were those

agreed upon in accordance with the procedure prescribed by that Act; a lease executed under the authority of the Liquidator of War Assets, a federal official acting under a delegation of authority from the Administrator of General Services, who was vested with supervision and direction over the disposition of surplus property; and a lease subject to the administration and management of said Administrator who had authority to enforce, adjust, and settle any right *of the Government*—not of the Reconstruction Finance Corporation—with respect thereto, in such manner and upon such terms as he deems in the best interest *of the Government.*

The Department of Air Force had determined that the use of the leased premises was necessary for the production of military equipment. This was not a function of Reconstruction Finance Corporation.

It will be noted that, during the negotiations for the execution of, or occupancy under the lease, Reconstruction Finance Corporation neither was entitled to, under the law, nor did it actually control or manage the property in any way whatsoever. Prior to this lease, that corporation had declared the property "surplus to its needs and responsibilities". Thereupon War Assets Administration entered into exclusive possession of the premises; used them for its needs; and subsequently negotiated for and executed interim leases respecting the same.

The War Assets Administration, General Services Administration, and officials acting for them referred to the premises as "surplus property *of the Government*" (not of the Reconstruction Finance Corporation), and as included in the types of surplus property which *have been assigned* to War Assets Administration for disposal. (Italics ours.)

The fact that the corporation did not execute a deed, quitclaiming any interest it had in the property to the United States of America, until March 17, 1955, is inconsequential to a determination of the issue at bar when compared with other facts in the case. The only title in the Reconstruction Finance Corporation was that vested by an Act of Congress transferring to it all assets of the Defense Plant Corporation (Pub. Law 109, 79th Congress, i. e., Act June 30, 1945, c. 215, 59 Stat. 310. See note 15 U.S.C.A. Sec. 611, p. 115.) It does not appear that any instrument evidencing such transfer of title ever was placed of record in this state. None was necessary. The corporation was a government agency. "That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely Governmental purposes." (*Cherry Cotton Mills, Inc. v. United States*, 327 U. S. 536, 539, 66 S. Ct. 729, 730.) Any title to, rights in, control over, or use of the "real property *of the* corporation" was subject to termination, transfer, regulation or limitation by whatsoever method Congress designated. (*United States v. Allegheny County*, [Pa.] 322 U. S. 174, 64 S. Ct. 908, 913.) By the Surplus Property Act of 1944, and the Federal Property and Administrative Services Act of 1949, Congress decreed that property of the corporation might be declared surplus and thereupon another agency of government would take custody and control thereof, with exclusive authority to dispose of the same, and to execute such documents as it deemed necessary to transfer title. Whatever was left after such a declaration, within reason or the intent of Congress, may not be described as "real property *of the corporation*". (Italics ours.) This residue was referred to as a "barren title" in the case of *United States v.*

Shofner Iron & Steel Works, 168 Fed. 2d 286, 287, which involved the right of the government to bring an action for possession of real property declared surplus by the Reconstruction Finance Corporation, where the court said: "Having declared the property surplus to its needs and responsibilities, that corporation retains no more than the barren legal title for the use of the United States to be transferred wherever the latter may direct." Pertinent, but not mentioned by the court, was the fact that Congress, in the Surplus Property Act, had designated an agent other than the Corporation to transfer the title, in substance reducing the status of the latter in relation to the property to that of a fictitious entity.

If the Reconstruction Finance Corporation had been a private corporation and as such to local taxation, having only that interest in the property in question which the evidence in this case shows it did have, i. e., a bare legal title subject to transfer by an agent over which it had no control, the primary rights of ownership therein being vested in the Government, as was the fact in this case, that property would not have been subject to local taxes. (*Johns Hopkins University v. Board of County Commissioners* [Md.] 45 Alt. 2d 747.) It is unreasonable to believe that Congress intended to subject property to local taxation because the bare legal title thereto was vested in a governmental agency, instead of in a private corporation.

The only reasonable conclusion which may be drawn from the facts and the law in this case is that the property in question, during the years 1951 through 1955 was not "real property of the Corporation" within the meaning of section 8 of the Reconstruction Finance Corporation Act, but rather, was surplus property of the United States of America.

This conclusion is in accord with the decision of the Court of Claims in *Board of County Commissioners of Sedgwick Co., Kansas, v. United States*, 105 Fed. Supp. 995, cited by appellant. The facts in the cited case are substantially similar to those of the case at bar except that in the former the lessee was in continuous possession before as well as after the surplus property declaration, and War Assets Administration did not dispose of the surplus property until after the levy of the taxes which were the subject of the action. The facts in the case at bar more firmly support our conclusion. In the cited case the court said (Ibid p. 1001):

> "The waiver of Constitutional immunity from taxes of 'real property of the corporation' . . . was undoubtedly intended to apply to that real property of the corporation held by it in the performance of the duties and responsibilities imposed upon it by law. But by the August 21, 1946, declaration of the property as surplus . . . the RFC declared that the property was surplus to its 'needs and responsibilities', and by the acceptance of April 16, 1947, was divested of all control and responsibility. At no time after the acceptance by the WAA on April 16, 1947, did the RFC or any of its employees have physical possession, control, or custody of the property. It had neither the use nor the right to use the property. It could not even withdraw the declaration of surplus property without the approval of the War Assets Administrator. (32 CFR, 1946 Supp. 8301.15(b).)" And also that "The purpose of the waiver provision had been fully served when the property passed to the control of WAA.
>
> "Upon consideration of these factors we cannot presume that Congress intended the waiver provision with respect to 'real property of the corporation' to extend to the lands in question after they passed to the responsibility and authority of WAA."

The taxes under consideration in this case were levied illegally. Appellant is entitled to recover the difference between the taxes paid and those which it should have paid on its possessory interest. *(Parr-Richmond Industrial Corporation v. Boyd,* 43 Cal. 2d 157, 169.)

The judgment is reversed with instructions to the trial court to enter judgment in favor of appellant in such amount as that court may determine in accord with this decision, the stipulation of the parties respecting appellant's possessory interest, and the law in the premises.

COUGHLIN

J. Pro Tem.

WE CONCUR:

GRIFFIN

P. J.

RUSSELL

J.

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO DEPARTMENT NO. 1

HON. ARTHUR L. MUNDO, JUDGE

ROHR AIRCRAFT CORPORATION,

Plaintiff,

vs.

COUNTY OF SAN DIEGO, a body corporate, and CITY OF CHULA VISTA, a Municipal Corporation,

Defendants.

NO. 200839

(Opinion of the Trial Court, announced from the bench as contained in the Reporter's transcript)

THE COURT: I should like to express my appreciation for the able argument of counsel. I think counsel have demonstrated considerable energy here in research, and very fine craftsmanship in the organization and presentation of the argument. It is indeed a pleasure to preside over a trial where the counsel present the case as you have done.

It does present quite a problem. Of course, we start out with the fundamental principle that the sovereign may not be taxed by a State without its consent. The property of the Federal Government is not to be taxed by a State unless Congress consents to taxation. Congress apparently recognized the economic situation

when Section 607 of Article XV of the United States Code was enacted, and it seems apparent from that legislation that Congress was attempting to give some relief to local taxpayers because of the enormous acquisitions of land by the Federal Government taking property off the rolls and thus imposing a heavier burden upon the local taxpayers. By this Section Congress declared that the real property owned by the Reconstruction Finance Corporation would be subject to taxation by local authorities. There was a reason for that, and the question is now, has that reason been removed, or does it still prevail?

It is true, as counsel have said, any waiver of immunity must be expressed clearly, and it must be strictly followed. This immunity here was expressly declared, and there has been no express repudiation of that, no express withdrawal of that consent to taxation which is given by Section 607.

Prior to the organization of the War Assets Administration, or Corporation, the real property owned by RFC was taxed by local taxing districts. After the war the Congress authorized the RFC to dispose of surplus properties. It must have been the intention of Congress to have it disposed of in an orderly fashion, in a manner which would have allowed a fair return to the Government for the property and not allow it to be subject to speculative dealings and the dumping of it into certain channels without proper remuneration. It apparently was a long-range outlook.

It is true, as it says in the Sedgwick Case, the Court of Claims case, the act creating the War Surplus Administration mentioned nothing about the requirement of a deed. It is not necessary that general rules of law always be enunciated in enactments of Congress or the Legislature. It wasn't necessary to declare that a deed should be given, but it does follow as a matter of general

law that the title to real property is transferred, and it is acquired by either a conveyance, a deed, or by an operation of law.

The lease, of course, presupposes that the one making it has the proper right so to do. Now, there was a lease executed in September of 1949 from the Reconstruction Finance Corporation and the United States of America, acting by and through the General Services Administrator. This lease was given to the Rohr Aircraft Corporation. If this lease hadn't been given by the Reconstruction Finance Corporation it wouldn't have been a lease at all, because the only way in which this lease could have been granted would be to have the owner grant it. It was thus granted by the Reconstruction Finance Corporation. The rest of the language there is descriptive of agencies working under RFC, so at all times from that time until the granting of the deed in May of 1955 Rohr Aircraft was holding the property under a lease from RFC. The lease required Rohr Aircraft to pay the local taxes.

It is contended that when RFC declared this property to be surplus that the transfer of the use and the right to disposition, and so forth, to the War Surplus left RFC with nothing but the barren legal title, and it is argued that all that it was then necessary to do was to deliver the deed. Well. that is necessary all the time. The delivery of the deed, of course, is the act which removes the title from one and transfers it to another. The title in this situation has always been in RFC until May of 1955.

Another question that was in my mind this noon when I was trying to assemble the argument of counsel was this: Is it proper for the Reconstruction Finance Corporation and War Surplus, or any Government facility, to withhold the delivery of the deed until some years after the occupancy of the property has been

transferred, and thus in effect nullify the consent which Congress had given in the case of property owned— real property owned by RFC? That seems to me to be a pretty cogent question. I think that should not be the intention of these agencies, and I think it certainly is not in the plan of the Congress formulated to dispose of the War Surplus.

If RFC, when it turned over the property to War Surplus, had made the deed then that they made later, it of course would have very effectively wiped out the consent. As a matter of fact, that consent could have been wiped out two ways; one, by express withdrawal by Congress, and the other is the transfer by deed of RFC to War Surplus.

Two cases have been cited principally, the Court of Claims Case, the Sedgwick Case, and the Michigan Case, Continental Motors Corporation. These cases seem to be diametrically opposed to each other. Actually, in their origin they are different, but they both attempt to pass upon the same questions, and it may be said that each of these cases has plenty of persuasion.

It has been urged by the plaintiff that we are now involved in the interpretation of a Federal Statute, and if there are Federal cases which have attempted an interpretation of that Statute, that the Courts of California are bound to follow the interpretation given by the Federal Court.

The Michigan Case would seem to disapprove of that sort of a precedent. The Michigan Case has declared that Congress gave this express consent for the taxation by local authorities of real property owned by RFC, and it has not expressly withdrawn that consent, and there can be no withdrawal by inference or implication.

Now, it may be urged that we are not actually construing

any statutes. It may be urged that we are searching through the realm of Federal Law to see if there is anything upon which we can cast a withdrawal of consent from the RFC taxation problem. All agree that there is no express withdrawal. Counsel for plaintiff declares that he is not seeking recovery upon any implied withdrawal.

We might also be concerned with the application of general law, the law of conveyances. The ownership of this property was in the RFC until 1955, and it cannot be said that it divested itself of title until that time, and the question which I posed for myself at noon is still with me.

I think that it is not proper for the governmental facilities by any delayed action to automatically nullify the consent which Congress gave to the local taxing of RFC owned property, so I will find for the defendant in that regard.

Now, I was also impressed with the argument of Mr. Wright on the matter of the occupancy of the property there. I was satisfied from the evidence that there was a hiatus in the occupancy, that the Rohr Aircraft Corporation did vacate the property in late 1945, and there was no real evidence that they went back in there until they began to get these interim leases in 1948, I believe it was. But I find overpowering the whole thing is this finding that I make regarding the title of the property remaining in RFC, so I will have to make that as the finding, and the rest of the matters, of course, will fall under it.

You may prepare the findings.

APPENDIX D

JAMES DON KELLER, District Attorney and
County Counsel, San Diego County

By CARROLL H. SMITH, Deputy

302 Civic Center, San Diego 1, Calif.
BE 9-7561, Ext. 451

Attorneys for County of San Diego

FILED
R. B. JAMES, Clerk
Jan. 29, 1957
By J. H. GREER, Deputy

IN THE
SUPERIOR COURT
OF THE
STATE OF CALIFORNIA IN AND FOR THE
COUNTY OF SAN DIEGO

ROHR AIRCRAFT CORPORATION,
a California Corporation,

Plaintiff,

v.

COUNTY OF SAN DIEGO, a body corporate, and CITY OF CHULA VISTA, a Municipal Corporation,

Defendants.

FINDINGS OF FACT
AND CONCLUSIONS
OF LAW

This cause came on regularly for trial on the 7th day of December, 1956, before the above-entitled court, in Department No. 1 thereof, the Honorable Arthur L. Mundo, judge presiding, plaintiff appearing by its attorneys, Glenn & Wright, by Leroy A. Wright and Olney R. Thorn; defendant County appearing by its attorneys, James Don Keller, District Attorney and County Counsel, and Carroll H. Smith, Deputy; defendant City of Chula

Vista appearing by its attorney, Merideth L. Campbell; and evidence oral and documentary having been introduced by the parties, and the case having been fully argued by counsel, and the trial having been concluded on the 11th day of December, 1956, and the cause having been submitted for decision, and the Court having considered the evidence and the arguments of counsel and being fully advised in the premises, does hereby make and enter its Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

I.

That the subject property, which is described in the lease attached to the complaint and marked Exhibit A, was acquired by Rohr Aircraft Corporation, plaintiff's predecessor in interest, from the Santa Fe Land Improvement Co. by deed dated June 2, 1941, and recorded June 11, 1941, in Book 1188, Page 494 of Official Records, San Diego County.

II.

That said property was conveyed by plaintiff's said predecessor in interest to Defense Plant Corporation, a subsidiary of Reconstruction Finance Corporation, by deed dated October 22, 1942, and recorded November 16, 1942, in Book 1423, Page 421, Official Records, San Diego County, as to one parcel or portion thereof, and by deed dated October 28, 1943, and recorded November 3, 1943, in Book 1582, Page 232 of Official Records, San Diego County, as to the remaining parcel or portion thereof.

III.

That on or about May 29, 1946, the Reconstruction Finance Corporation transferred custody of the subject property to the

War Assets Administration under and pursuant to the Surplus Property Act of 1944, 58 Stat. 765, 50 U.S.C.A. Appendix, Sec. 1611 et seq.

IV.

That on September 1, 1949, the Reconstruction Finance Corporation entered into the lease of the subject property with plaintiff's predecessor in interest, said lease being hereinbefore referred to as Exhibit A.

V.

That the plaintiff in this action is a corporation other and different from the Rohr Aircraft Corporation which was the original lessee under the lease attached as Exhibit A to the complaint herein. That said original Rohr Aircraft Corporation, not this plaintiff, was the grantee under the deed mentioned in paragraph I hereinabove, and the grantor in the deeds mentioned in paragraph II hereinabove. That the plaintiff herein was organized under the laws of the State of California on October 18, 1949, and thereafter, on December 7, 1949, acquired by purchase, the assets of said original lessee and said lease was thereupon duly assigned to plaintiff, who is the successor in interest to said original corporation.

VI.

That under and pursuant to the terms of said lease plaintiff covenanted to pay and did pay the taxes assessed, levied and collected against the subject property, and sought to be refunded in this action.

VII.

That the Reconstruction Finance Corporation did not dispose of its legal title to the subject property until 1955, when it conveyed the same to the United States of America by quitclaim

deed dated March 17, 1955, and recorded May 6, 1955, in Book 5634, Page 66 of Official Records, San Diego County.

VIII.

That at all times mentioned in the complaint, to wit, for and during the fiscal years 1951-52, 1952-53, 1953-54, and 1954-55, and for some time prior and subsequent thereto, to wit, from November 3, 1943 to May 6, 1955, the Reconstruction Finance Corporation was the record owner and holder of the legal title to the subject property. That during each of said fiscal years, 1951-52 to 1954-55 inclusive, the subject property was assessed to Reconstruction Finance Corporation.

IX.

That the subject property is and was at all times mentioned in the complaint real property consisting of land and improvements thereon.

X.

That the taxes which were assessed, levied and collected by the defendants against the subject property and which are sought to be refunded in this action were and are real property taxes.

XI.

That ever since 1932, and at all times mentioned in the complaint, by express Congressional consent, to wit, under and pursuant to Title 15, Sec. 607, United States Code Annotated, the real property of the Reconstruction Finance Corporation has been subject to local taxation to the same extent according to its value as other real property is taxed.

XII.

That the Court makes no findings as to the separate affirmative defense of the defendants.

FROM THE FOREGOING FINDINGS OF FACT THE COURT MAKES ITS CONCLUSIONS OF LAW AS FOLLOWS:

I.

That the Reconstruction Finance Corporation was the record owner and holder of the legal title to the subject property from November 3, 1943 to May 6, 1955, and was the proper and lawful assessee thereof for the four tax years in question, to wit, for the fiscal years 1951-52 to 1954-55 inclusive.

II.

That said transfer of custody of the subject property to the War Assets Administration on or about May 29, 1946, did not operate as or constitute in any way a withdrawal, termination, or revocation, either express or implied, of the express Congressional consent to tax said subject property conferred by the Reconstruction Finance Corporation Act provision aforesaid, to wit, Title 15, Sec. 607, U.S.C.A.

III.

That accordingly the taxes herein sought by plaintiff to be recovered were and are properly and lawfully assessed, levied and collected by defendants and are not refundible to plaintiff or any other person or party, in whole or in part, or at all.

IV.

That both defendants are entitled to judgment against the plaintiff that the plaintiff take nothing, that the complaint be dismissed with prejudice, and that defendants recover their costs.

Dated, San Diego, Calif., Jan. 29, 1957.

ARTHUR L. MUNDO
Judge of the Superior Court

APPENDIX E

JAMES DON KELLER, District Attorney and
County Counsel, San Diego County

By CARROLL H. SMITH, Deputy

302 Civic Center, San Diego 1, Calif.
BE 9-7561, Ext. 451

Attorneys for County of San Diego

FILED

R. B. JAMES, Clerk
Jan. 29, 1957

By J. H. GREER, Deputy

ROHR AIRCRAFT CORPORATION,
a California Corporation,

Plaintiff,

v.

COUNTY OF SAN DIEGO, a body corporate, and CITY OF CHULA VISTA, a Municipal Corporation,

Defendants.

No. 200839

ENTERED
Jan. 29, 1957
Judgment Book *127*,
Pg. *202*

JUDGMENT

This cause came on regularly for trial on the 7th day of December, 1956, before the above-entitled court, in Department No. 1 thereof, the Honorable Arthur L. Mundo, judge presiding, plaintiff appearing by its attorneys, Glenn & Wright, by Leroy A. Wright and Olney R. Thorn; defendant County appearing by its attorneys, James Don Keller, District Attorney and County Counsel, and Carroll H. Smith, Deputy; defendant City of Chula Vista appearing by its attorney, Merideth L. Campbell; and evidence oral and documentary having been introduced by the parties, and the case having been fully argued by counsel, and the trial having been concluded on the 11th day of December, 1956, and the cause having been submitted for decision, and the Court having considered the evidence and the arguments of counsel and being fully advised in the premises and having heretofore made

and entered its Findings of Fact and Conclusions of Law, NOW THEREFORE

IT IS ORDERED, ADJUDGED AND DECREED:

That both defendants have judgment against the plaintiff; that the plaintiff take nothing; that its complaint be dismissed with prejudice, and that defendants recover their costs in the sum of $..............................

Dated, San Diego, Calif., Jan. 29, 1957.

ARTHUR L. MUNDO
Judge, Superior Court

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IN THE

SUPREME COURT OF THE UNITED STATES

Office-Supreme Court, U.S.
FILED
AUG 20 1959
JAMES R. BROWNING, Clerk

OCTOBER TERM, 1959

No. 295

ROHR AIRCRAFT CORPORATION, a California Corporation,
Appellant,

vs.

COUNTY OF SAN DIEGO, a Body Corporate, and CITY OF CHULA VISTA, a Municipal Corporation,
Appellees.

MOTION TO DISMISS OR AFFIRM ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

HENRY A. DIETZ, County Counsel
County of San Diego

BY CARROLL H. SMITH, Deputy
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Attorney for Appellee, City of Chula Vista.

MOTION TO DISMISS OR AFFIRM
REPLY TO STATEMENT AS TO JURISDICTION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No.

ROHR AIRCRAFT CORPORATION, a California Corporation,
Appellant,
vs.
COUNTY OF SAN DIEGO, a Body Corporate, and CITY OF CHULA VISTA, a Municipal Corporation,
Appellees.

REPLY TO STATEMENT AS TO JURISDICTION

Appellees County of San Diego and City of Chula Vista respectfully move the Court to dismiss the appeal or to affirm the opinion of the California Supreme Court on the following grounds:

I. That there is a want of jurisdiction to sustain the appeal.

II. That there is no substantial Federal question involved.

I.

WANT OF JURISDICTION

There is no jurisdiction in the United States Supreme Court in that jurisdiction is attempted to be predicated upon subsection (2) of Title 28, U.S.C., sec. 1257, which subsection reads:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

At pages 4 through 7 of the Appellant's Statement as to Jurisdiction are set out California Constitution article XIII, section I and the following sections of the Revenue and Taxation Code of the State of California: 201, 401, 404, 405, 601, 602, 611, 612, 613, 2151, 2152, 2186, 2187, 2188, 2602, 2605, 2606 and 2607. There is no attempt made by Appellant to show wherein any of said constitutional or statutory provisions are in any way repugnant to the Constitution, treaties or laws of the United States, or wherein the Supreme Court of the State of California has held any of those provisions so to be repugnant. Instead, it is respectfully submitted by Appellees that the entire question before the California courts was a construction of the congressional intent in the enactment of Reconstruction Finance Corporation Act, ch. 166, sec. 8, 66 Stat. 205 (1947) as amended, 15 U.S.C.A. 607 (1948), formerly Reconstruction Finance Corporation Act, ch. 8, sec. 10, 47 Stat. 9 (1932), the pertinent provision of which is, "[A]ny real property of the [Reconstruction Finance] Corporation . . . shall be subject to . . . county, municipal or local taxation to the same extent according to its value as other real property is taxed." The California Supreme

Court in the opinion sought to be reviewed herein followed the opinion of the Michigan Supreme Court, *Continental Motors Corporation* v. *Township of Muskegon* (1956) 346 Mich. 141 [77 N.W. 2d 370], in holding that Congress effectively intended to subject to taxation the property of the Reconstruction Finance Corporation standing of record in its name; that the federal officials dealing with such matters, having made a determination that the property should be transferred to the United States of America or to any other tax exempt governmental body, could readily achieve their purpose of obtaining tax exemption by causing to be recorded a deed of conveyance in the office of the county recorder; that undisclosed documents reposing in the decks and files of United States officials are not sufficient effectively to transfer ownership from Reconstruction Finance Corporation.

It is also urged by Appellees that the question of land ownership and the necessity of recordation of a deed in order to notify local officials or local purchasers with respect to land titles is primarily a matter of local law and the construction of California statutes by California courts; that the construction of what constitutes an effective transfer of land ownership within the contemplation of Congress in enacting the Reconstruction Finance Corporation law is a matter of California law which the United States Supreme Court will not review. Among the cases holding that the United States Supreme Court will not review state court decisions on provisions of general law are *Iowa* v. *Rood,* 187 U.S. 87; *Sayward* v. *Denny,* 158 U.S. 180; *Fox Film Corp.* v. *Muller,* 296 U.S. 207; *Eastern Ry. Co. of New Mexico* v. *Littlefield,* 237 U.S. 140. In this connection it is likewise urged that the case upon which Appellant most strongly relies in support of its position, the decision of the Court of Claims, *Board of County*

Commissioners of Sedgwick County, Kansas v. *United States* (1952) 105 F. Supp. 995, could in essence turn upon a determination that in the opinion of the Court of Claims recordation of a deed was not required by Iowa law as a condition precedent to an effective change of ownership for purposes of taxability, whereas the Michigan Supreme Court in the case of *Continental Motors Corporation* v. *Township of Muskegon* and the California Supreme Court in the instant case have held that such recordation is essential.

It is of course recognized by Appellees that the United States Supreme Court may treat an abortive appeal as a petition for certiorari (28 U.S.C. 2103). In this connection, however, it is urged that the reasoning of the Michigan Supreme Court and the California Supreme Court is sufficiently more persuasive as contrasted with the decision of the Court of Claims that certiorari should be denied as well as the attempted appeal dismissed.

The three cases cited by Appellant at page 3 of its Statement as to Jurisdiction clearly do not go to the point of an attempted appeal which seeks to blast aside with one fusilade from a sawed-off shotgun not one statute of California but the entire body of California taxing procedures.

In *Standard Oil Co. of California* v. *Johnson*, 316 U.S. 481, there was drawn into question the California Motor Vehicle License Tax Act to the extent that its gallonage provisions were held applicable to United States Army Post Exchanges in California. A single statute was found to be repugnant to the United States Constitution.

In *Minnesota* v. *National Tea Co.*, 309 U.S. 551, one provision of a graduated chain store tax was drawn into question. While jurisdiction was established, the jurisdiction was exercised by

remanding the matter to the Supreme Court of Minnesota for clarification as to whether in its opinion the Constitution of the United States or that of the State of Minnesota was the controlling basis for its opinion. There was again no attempt to allege that not one but nineteen separately enumerated statutes had been or could be drawn into question.

In *State Tax Commission of Utah* v. *Van Cott*, 306 U.S. 511, the question was whether the Utah State Income Tax Law was applicable to salaries paid an attorney for a federal agency. The State was granted certiorari and the United States Supreme Court held the salary taxable.

In the opinion of the California Supreme Court set forth in Appellant's Statement as to Jurisdiction as Appendix A, pages 19 through 26, a careful reading fails to disclose any citation or mention of the California Constitution or of any of the statutory provisions sought in the Statement as to Jurisdiction to be declared void as in conflict with the United States Constitution, treaties or laws. It is the Federal statute which was discussed and considered. The same is true of the opinions of the District Court of Appeal, Appendix B, page 27 through 41 of the Statement as to Jurisdiction, and of the opinion of the Superior Court, Appendix C, pages 42 through 46. It is therefore respectfully submitted that Appellant has not shown that it has drawn into question at any stage the validity of a statute of the State of California or the Constitution of the State of California as being repugnant to the Constitution, treaties or laws of the United States.

II.

WANT OF SUBSTANTIAL FEDERAL QUESTION

There is no substantial Federal question involved.

The issue has been accurately stated both in Appellant's Statement as to Jurisdiction and in the opinion of the California Supreme Court. The Reconstruction Finance Corporation was the owner of record for the fiscal years 1951-52 through 1954-55. In 1955 the Reconstruction Finance Corporation conveyed its interest to the United States and there is no dispute between the parties as to the tax exemption of the United States when its ownership is established by a recorded conveyance.

As to whether the Reconstruction Finance Corporation, or, as in the present case, its tenant, who has by lease obligated itself to pay whatever taxes may be lawfully imposed, remains taxable during a period when a transfer of ownership has been made by unrecorded agreement and no notice of such transfer has been given to the taxing authorities, there are to the best information of counsel for both parties only three reported decisions. The decision on which Appellant relies is a decision of the Court of Claims, *Board of County Commissioners of Sedgwick County, Kansas* v. *United States* (1952) 105 F. Supp. 995. The decision upon which Appellees rely in addition to the opinion of the California Supreme Court involved in this appeal is a decision of the Michigan Supreme Court, *Continental Motors Corporation* v. *Township of Muskegon* (1956) 346 Mich. 141 [77 N.W. 2d 370]. There is some additional discussion of the problem in *United States of America* v. *Hanlon*, 165 F. Supp. 1, but it is not believed that this decision is of particular significance.

By way of parenthetical statement Appellees wish to observe

that their research was considerably disturbed and their emotions exacerbated by an error of private law book publishers. It would appear from Shepard's Citations, American Law Reports and the Supreme Court Reporter that *Continental Motors Corporation* v. *Township of Muskegon* (1956) 346 Mich. 141 [77 N.W. 2d 370] was heard and affirmed by the United States Supreme Court, which, of course, would set at rest all question of the relative force of a decision of the Court of Claims as contrasted with the decisions of the Supreme Courts of Michigan and California. Shepard's Northwestern Citations shows 77 N.W. 2d 370 noted for probable jurisdiction at 352 U.S. 963, 1 L. Ed. 2d 319, 77 S. Ct. 357. 352 U.S. 963, nos. 564 and 565, show that it is the other Muskegon case, 346 Mich. 218 [77 N.W. 2d 799], which was heard by the United States Supreme Court and affirmed as *United States* v. *Township of Muskegon,* 355 U.S. 484.

These Appellees believe, with respect to the substantiality of the Federal question, that their efforts would not be as persuasive as the language and reasoning of the California Supreme Court speaking through Mr. Justice Spence. We accordingly quote herewith and adopt as our argument the statement, reasoning and authorities concluding the California Supreme Court opinion as follows:

> "Plaintiff contends, however, that we must reverse the judgment, on the authority of the Sedgwick case, supra, 105 F. Supp. 995, even though we disagree with the decision of the Court of Claims. It is true that we are bound by interpretations of federal statutes by the United States Supreme Court. (U.S. Const., art. VI, § 2.) In our opinion, however, the decisions of the lower federal courts on federal questions are

merely persuasive. (See Stock v. Plunkett, 181 Cal. 193, 194-195; Continental Motors Corp. v. Township of Muskegon, supra, 346 Mich. 141 [77 N.W. 2d 370]; State ex rel. St. Louis, V. & M. Ry. v. Taylor, 298 Mo. 474, 489-490 [251 S.W. 383 to 387], aff'd, 266 U.S. 200; Note, 147 A.L.R. 857; 21 C.J.S. Courts § 206 p. 365.) Although the parties have cited no decision of the United States Supreme Court directly passing upon the point, plaintiff argues that in any event our own decisions require us to follow the Court of Claims. Plaintiff relies on general statements to the effect that this court must accept the construction placed upon federal statutes by the federal courts. Those statements were made, however, either in the light of controlling United States Supreme Court decisions (In re Hallinan, 43 Cal. 2d 243, 250-252; Mackenzie v. Hare, 165 Cal. 776, 779, 785) or in cases where this court had no disagreement with the position taken by the lower federal courts. (Penn. R.R. Co. v. Midstate etc. Co., 21 Cal. 2d 243, 245; Dougherty v. California Kettleman, etc., 9 Cal. 2d 58, 88-89.)

"Where lower federal court precedents are divided or lacking, state courts must necessarily make an independent determination of federal law. Any rule which would require the state courts to follow in all cases the decisions of one or more lower federal courts would be undesirable, as it would have the effect of binding the state courts where neither the reasoning nor the number of federal cases is found persuasive. Such a rule would not significantly promote uniformity in federal law, for the interpretation of an act of Congress by a lower federal court does not bind other federal courts except those directly subordinate to it. (United States v. Ciccotta, 146 F. Supp. 61,

62; General Electric Co. v. Refrigeration Patents Corp., 65 F. Supp. 75, 81; United States v. St. Clair, 62 F. Supp. 795, 797; see also Rule 19, Revised Rules of the Supreme Court, § 1(b).) We therefore conclude that the courts of this state may decline to follow the decision of the Court of Claims, as the reasoning of that decision is not persuasive."

Respectfully submitted,

HENRY A. DIETZ, County Counsel
County of San Diego

BY CARROLL H. SMITH, Deputy

DUANE J. CARNES, Deputy
Attorneys for Appellee, County of San Diego

MANUEL L. KUGLER, City Attorney of the City of Chula Vista,
Attorney for Appellee, City of Chula Vista

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FILED
SEP 16 1959
JAMES R. BROWNING,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 295

ROHR AIRCRAFT CORPORATION,
a California Corporation,
Appellant,
vs.

COUNTY OF SAN DIEGO, a Body Corporate, and CITY OF CHULA VISTA, a Municipal Corporation

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

Appellant, Rohr Aircraft Corporation, has brought the above-entitled cause to this Court by appeal under the provisions of subsection (2), Title 28, U.S.C., section 1257, after decision by the Supreme Court of the State of California. Appellees have, pursuant to the provisions of Rule 16 of this Court,

filed a motion to dismiss and to affirm the decision of the court below, on the grounds — first, that there is a want of jurisdiction to sustain the appeal, and second, that no substantial federal question is involved.

This brief is presented on behalf of Appellant in opposition to these motions. The opinions below are identified and set forth in the appendices contained in Appellant's Jurisdictional Statement and will not here be repeated. Nor, will we restate the case, since Appellees, in their motion, acknowledge that "The issue has been accurately stated both in Appellant's Statement as to Jurisdiction and in the opinion of the California Supreme Court."

ARGUMENT

I

THE ISSUE IN THIS CAUSE INVOLVES THE VALIDITY OF CERTAIN STATUTES OF THE STATE OF CALIFORNIA ON THE GROUND OF THEIR BEING REPUGNANT TO THE CONSTITUTION AND LAWS OF THE UNITED STATES, AND THE DECISION OF THE COURT BELOW WAS IN FAVOR OF THE VALIDITY OF THE STATE STATUTES.

As more fully appears from the Jurisdictional Statement, Appellees levied, with respect to property owned by the United States, certain ad valorem taxes which were measured by and assessed against the fee interest of the United States. Justification for such levies, if it exists, must of necessity be founded upon the consent of Congress contained in the Reconstruction Finance Corporation Act (15 U.S.C.A. 607), by which the constitutional immunity of the federal government from local taxation was waived with respect to certain classes of property owned by that corporation. Appellant contends that, during each of the years

involved in this cause, the properties assessed by Appellees were not properties of Reconstruction Finance Corporation, but rather, were owned by the United States, and that the waiver was inapplicable. The California courts so interpreted the dealings had by the various federal instrumentalities with respect to the subject property as to conclude that they were still owned by Reconstruction Finance Corporation and fell within the gamut of the waiver above noted. In so doing, the state court applied local rules of property conveyancing and upheld the validity of the taxing statutes and the levies made pursuant thereto.

Almost the precise question was presented in *Reconstruction Finance Corporation* v. *Beaver County* (328 U.S. 204, 66 S. Ct. 992, 90 L. Ed. 1172). In that case, local taxing authorities had assessed certain machinery and fixtures belonging to RFC and located upon property owned by it but leased to Curtiss-Wright Corporation, upon the theory that such machinery and fixtures constituted real property of RFC, under the terms of the waiver statute. Following a decision upholding the levies by the Supreme Court of Pennsylvania, the case was brought to this Court by appeal. A motion to dismiss was made, and this Court, speaking through Mr. Justice Black (without dissent), stated:

> "By § 10 of the Reconstruction Finance Corporation Act, as amended [January 22, 1932] 47 Stat. 5, 9, c 8 [June 10, 1941] 55 Stat. 248 c 190, 15 USCA § 610, 4 FCA title 15, § 610, Congress made it clear that it did not permit states and local governments to impose taxes of any kind on the franchise, capital, reserves, surplus, income, loans, and personal property of the Reconstruction Finance Corporation or any of its subsidiary corporations. Congress provided in the same section that 'any real property' of these governmental agencies 'shall be subject to State, Territorial, County, municipal, or

local taxation to the same extent according to its value as other real property is taxed.' The Supreme Court of Pennsylvania sustained the imposition of a tax on certain machinery owned and used in Beaver County, Pennsylvania, by the Defense Plant Corporation, an RFC subsidiary. The question presented on this appeal from the Supreme Court judgment is whether the Supreme Court's holding that this machinery is 'subject to' a local 'real property' tax means that the Pennsylvania tax statute, 72 Purdon's Pennsylvania Stat. (1936) 5020-201, as applied conflicts with § 10 of the Reconstruction Finance Corporation Act. This appeal, thus, challenges the validity of a state statute sustained by the highest court of the state and raises a substantial federal question. We have jurisdiction under 28 USCA § 344 (a), 8 FCA title 28, § 344 (a) and appellee's motion to dismiss is denied."

One wonders how there can be more directly raised a federal question than is involved in this case, where the courts of a state have interpreted and applied federal laws contrary to the manner in which those laws have been interpreted and applied by federal courts and, in so doing, have upheld the validity of state statutes and tax levies made thereunder.

Here, as in the *Beaver County* case, the question involved is whether the holding of the California courts, that the property taxed was the property of RFC, conflicts with Section 607 of Title 15 and the actions taken under the authority of the Surplus Property Act of 1944, as those federal statutes have and should be interpreted. It is difficult, indeed, to imagine a plainer case involving a conflict between state and federal action, wherein the decision of the state court has been favorable to the state.

Appellees, in their motion, argue that there was no transfer

of the property from RFC to War Assets Administration by reason of the proceedings taken under the Surplus Property Act of 1944, since no formal deed was given or recorded in accordance with local law. This argument ignores the provisions of Article IV, Section 3, Clause 2, of the Federal Constitution, providing that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . ." This power is paramount and superior and without limitation (*United States* v. *County of Allegheny*, 322 U.S. 174, 64 S. Ct. 908, 88 L. Ed. 1209). It has been clearly established that the federal government, in dealing with its property and interests, is not bound by the provisions of local law relating to the transfer of title and need not avail itself, if it chooses not to do so, of the provisions of local recording acts (*Detroit Bank* v. *United States*, 317 U. S. 329, 63 S. Ct. 297, 87 L. Ed. 304; *Federal Land Bank* v. *Crosland*, 261 U. S. 374, 43 S. Ct. 385, 67 L. Ed. 703). See also, *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 63 S. Ct. 573, 87 L. Ed. 838.

The foregoing cases effectively answer the contention made by Appellees that this Court will not review state court decisions touching provisions of general law. The transfer of federally-owned property from one agency of the federal government to another is not a matter of general law.

Appellees seem to contend that an appeal to this Court will lie only where the validity of one specific statute of a state has been drawn into question. Their contention in this regard completely ignores and overlooks the myriad of cases in which state action taken under the authority of a body of statutory law has been reviewed by this court on appeal.

Penn Dairies v. *Milk Control Commission*, 318 U. S. 261, 63 S. Ct. 617, 87 L. Ed. 748.

United States v. *County of Allegheny*, 322 U. S. 174, 64 S. Ct. 908, 88 L. Ed. 1209.

Reconstruction Finance Corporation v. *Beaver County*, 328 U. S. 204, 66 S. Ct. 992, 90 L. Ed. 1172.

Wheeling Steel Corporation v. *Glander*, 337 U. S. 562, 69 S. Ct. 1291, 93 L. Ed. 1544.

Interstate Oil Pipe Line Co. v. *Stone*, 337 U. S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613.

Kern-Limerick, Inc. v. *Scurlock*, 347 U. S. 110, 74 S. Ct. 403, 98 L. Ed. 546.

Society for Savings v. *Bowers*, 349 U. S. 143, 75 S. Ct. 607, 99 L. Ed. 950.

II.
A SUBSTANTIAL FEDERAL QUESTION IS RAISED

Appellees do not and cannot argue that no federal question is involved. The Constitution of California itself exempts from ad valorem tax properties which are exempt under the laws of the United States. The very right of the state to tax is predicated upon a construction of federal statutes. The California Court has chosen to place its own interpretation on these federal statutes, casting aside in so doing the decision of a lower federal court precisely in point. Appellees argue that this conflict between the decision of the Court of Claims (*Board of County Commissioners of Sedgwick County, Kansas* v. *United States*, 105 Fed. Supp. 995) and the Supreme Court of the State of Michigan (*Continental Motors Corporation* v. *Township of Muskegon*, 346 Mich. 141, 77 N. W. 2d 370), buttressed by that of the Supreme Court of California

in the case below, does not present a substantial federal c
merely because the California Court, for its own purposes.
feel bound to follow the Court of Claims.

The true test of substantiality of the federal quest:
involved lies in the answers to the questions that follow.

Does the issue have substance? Here involved is
the basic powers granted Congress by the Federal Consti
the right to deal with federal property as the Congress
unfettered and not circumscribed by concepts or rules of lo
Also involved is the scope, intent, and purpose of a wai
ago enacted by Congress, wherein it for a particular re
sented to local taxation of certain limited properties belo
the United States. Can a state, by making its own interpret
federal law, expand the scope of that waiver beyond th
of Congress? If so, there would appear to be no sancti
doctrine enunciated by this Court in *M'Culloch* v. *The
Maryland*, 4 Wheat. 316, 4 L. Ed. 579.

Is the appeal frivolous? In view of the conflict whi
between the cases cited and, indeed, the different view
various California courts, set forth in the appendices
pellant's Jurisdictional Statement, no such characteriz
be made.

Are the issues raised by the appeal settled? Obvio
The only settlement of the issues here raised will come as
of this Court's decision upon the merits of the cause h
sented. The Supreme Court of Michigan and the Suprem
of California have determined these issues in favor of the
of state taxation and have, in effect, placed limitations u
power of the Congress under the Federal Constitution to e
deal with federal property. Their holdings in this regar
variance with the decisions of the Court of Claims. They

at variance with the holdings of other federal courts in other cases, which are cited and discussed in the various opinions contained in the appendices to the Jurisdictional Statement. Appellees in making their motion to dismiss or affirm make no analysis and present no facts upon which they base a bare conclusion that no substantial federal question is presented.

Pressures for local governmental services are mounting. The costs of those services are increasing. Local governments are seeking all sources of revenues that are possibly available to them. Likewise, our national government is beset with budgetary problems. The conflict of interest as between governmental agencies in their search for tax revenues is increasing — not lessening. The rules of the road and the guideposts to indicate sanctuaries are now more than ever needed. When the sovereign gives consent that only certain of its properties may be taxed, that consent should not be permitted to be expanded and enlarged beyond its original scope, else the whole doctrine of intergovernmental tax immunity will become historic. This is the problem presented by this appeal. Its resolution will depend upon the view of this Court on the merits after full presentation and argument.

CONCLUSION

Appellees' motion to dismiss or affirm is based upon the inapplicability of subsection (2), Title 28, U.S.C., section 1257, and upon the want of a substantial federal question. The jurisdiction of this Court on appeal in this case is the same as that in *Reconstruction Finance Corporation* v. *Beaver County, supra.* The substantiality of the federal question is apparent in the different views taken by the Supreme Court of Michigan, the Court of Claims of the United States, and the California Supreme Court in the instant case.

It is therefore urged that this Court enter its order denying

Appellees' motion to dismiss or affirm, and further noting probable jurisdiction in the cause here presented, and that the matter thereafter be heard and considered on its merits.

Respectfully submitted,

LEROY A. WRIGHT,

Attorney for Appellant

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 295

ROHR AIRCRAFT CORPORATION,
a California Corporation,
Appellant,

vs.

COUNTY OF SAN DIEGO, a Body Corporate, and CITY OF CHULA VISTA, a Municipal Corporation

BRIEF OF APPELLANT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 265

ROHR AIRCRAFT CORPORATION,
a California Corporation,
Appellant,

vs.

COUNTY OF SAN DIEGO, a Body Corporate, and CITY OF CHULA VISTA, a Municipal Corporation.

BRIEF OF APPELLANT

Appellant, Rohr Aircraft Corporation, herewith respectfully presents its Brief in support of its appeal from the judgment of the Supreme Court of the State of California, noted below.

I

OPINIONS BELOW

Opinions delivered by the courts below are as follows:

(a) *Rohr Aircraft Corporation v. County of San Diego and City of Chula Vista*, Supreme Court of the State of California, L. A. 24956, filed March 6, 1959; 51 Cal. 2d 759, 336 P. 2d 521.

Cases (Continued)

Statutes

[illegible]

[illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 295

ROHR AIRCRAFT CORPORATION, a California Corporation, *Appellant*, vs. COUNTY OF SAN DIEGO, a Body Corporate, and CITY OF CHULA VISTA, a Municipal Corporation	

BRIEF OF APPELLANT

Appellant, Rohr Aircraft Corporation, herewith respectfully presents its Brief in support of its appeal from the judgment of the Supeme Court of the State of California, noted below.

I.

OPINIONS BELOW

Opinions delivered by the Courts below are as follows:

(a) *Rohr Aircraft Corporation* v. *County of San Diego and City of Chula Vista,* Supreme Court of the State of California, L. A. 24556, filed March 17, 1959; 51 Cal. 2d 759; 336 P. 2d 521.

(b) *Rohr Aircraft Corporation v. County of San Diego and City of Chula Vista*, District Court of Appeal, Fourth Appellate District, Civil No. 5492, filed October 9, 1958; 164 Advance California Appellate Reports 94; 330 P. 2d 291 (See Appendix B to this brief).

II.
GROUNDS FOR JURISDICTION

Jurisdiction of this Court is invoked upon the following grounds:

(a) This is an action by Appellant, as lessee of real property owned by the United States, to recover local property taxes assessed against the United States and paid by Appellant under the requirements of its lease. Claims for refund were filed with each taxing authority, under Section 5096 of the Revenue and Taxation Code of the State of California; and, upon denial of such claims, Appellant instituted this action under the authority of Section 5103 of the Revenue and Taxation Code of the State of California. Appellant's action is predicated upon the proposition that the property leased by it was owned by the United States, and that the assessments were, therefore, erroneous and illegal under the Federal Constitution as interpreted by this Court, *M'Culloch v. The State of Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Van Brocklin v. Tennessee*, 117 U. S. 151, 29 L. Ed. 845, 6 S. Ct. 670; *United States v. County of Allegheny*, 322 U. S. 174, 88 L. Ed. 1209, 64 S. Ct. 908.

(b) The judgment sought to be reviewed is that of the Supreme Court of the State of California, which was entered March 17, 1959. Appellant thereafter filed a Petition for Rehearing, which was denied, April 15, 1959. The judgment of the

Supreme Court of the State of California affirmed that of the trial court, in denying to Appellant a refund of the taxes sought to be recovered. Notice of Appeal to the Supreme Court of the United States was filed on June 12, 1959, with the Supreme Court of the State of California.

(c) Jurisdiction of the appeal is believed to be conferred on this Court by Subdivision (2) of Title 28, U. S. C., Section 1257.

(d) The cases which are believed to sustain the jurisdiction of this Court are *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1611, 62 S. Ct. 1168; *State Tax Commission of Utah* v. *Van Cott*, 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 358; *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 84 L. Ed. 920, 60 S. Ct. 676; *Reconstruction Finance Corp.* v. *Beaver County*, 328 U. S. 204, 66 S. Ct. 992, 90 L. Ed. 1172.

(e) The issue in this case involves the validity of the statutes of the State of California which, by its Constitution and the provisions of its Revenue and Taxation Code, provide, seriatim, for the taxation of all property located in the state, proportional to its value, which is not exempt from such taxation under the laws of the United States. It is the position of Appellant that there is thus drawn into question the provisions of the laws of the State of California which have been challenged as being in contravention of the laws of the United States, and that the decision of the Supreme Court of California has upheld the validity of the state statutes and the tax levies made thereunder.

III.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions and statutes which are here involved are:

(a) The Constitution of the State of California, Article XIII, Section 1, which provides in part:

> "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided . . ."

(b) The various sections of the Revenue and Taxation Code of the State of California (Deering's Revenue and Taxation Code of the State of California) are involved, insofar as they are the statutes under which the tax levies complained of in this case were made. Set forth in Appendix A to this brief are the important provisions of the Code relating to the levy, assessment, and collection of real property taxes within the State of California. Many of the procedural sections have been omitted from the appendix.

(c) The provisions of Federal law which are involved are:

> (1) Article IV, Section 3, Clause 2 of the Constitution of the United States : "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . ."
>
> (2) Reconstruction Finance Corporation Act (Act of January 22, 1932, Section 8, as amended; 47 Stat. 8, 15 USCA 607):
>
> "The Corporation, including its franchise, capital, reserves and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority, except that any real property of the Corporation shall be subject to special assessments for local improvements and shall be subject to State, Territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed. The exemptions provided for in the pre-

ceding sentence with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with respect to the Corporation but also with respect to any other public corporation which is now or which may be hereafter wholly financed and wholly managed by the Corporation. . . ."

(3) Surplus Property Act of 1944 (Act of October 3, 1944, 58 Stat., c. 479). Pertinent sections of this Act, insofar as they are applicable here, are set forth in Appendix A.

(4) Regulations of the War Assets Administration, so far as here pertinent, are likewise set forth in Appendix A. The official text of these regulations is contained in Title 44, Chapter IV, of the Code of Federal Regulations (Section 401, et seq.).

IV.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(a) Where the Congress has, by express statute, waived the Constitutional immunity of the Federal Government from local tax with respect to a property of a particular subsidiary (i.e., property of the Reconstruction Finance Corporation, 15 U. S. C. 607), and where the Congress has thereafter provided for the effectual transfer of such property to another agency created by it [War Assets Administration (Surplus Property Act of 1944, 58 State. 765, 50 U. S. C. A. Appendix, Sections 1611, et seq.)] and has not expressly extended the waiver of tax immunity to encompass the property of such new owning agency, are taxes imposed by a county, municipality, and other local taxing authorities, levied after the transfer accomplished under the congressionally-prescribed mechanics, valid (*M'Culloch* v. *The State of Maryland*, 4 Wheat. 316, 4 L. Ed. 579)?

(b) Is it necessary for the Federal Government, in providing for transfers of federally-owned property, as between its various corporations and agencies, to comply with the common law concepts of conveyancing, so that such a transfer cannot occur in the absence of a formal deed, recorded in compliance with the local law?

(c) If the answer to the question posed in paragraph (b) above is negative, does the judgment of a state court, inferentially requiring compliance with local law, violate the supremacy clause of the Constitution of the United States (Article I, Section 8, Clause 18)?

(d) Can a state, by imposing its own views as to the requirements of property transfers between agencies of the Federal Government, notwithstanding the express provisions of the Federal Constitution (Article IV, Section 3, Clause 2), defeat the Constitutional immunity fom local taxation which was waived by the Congress with respect to the original owning agency, but not with respect to the transferee agency?

V.

STATEMENT OF THE CASE

This case involves the validity of local property taxes assessed during each of the years 1951-2 through 1954-5, against the fee interest of the United States upon its property located in the County of San Diego and the City of Chula Vista (R. 36-37). These properties and improvements had originally been acquired by the Defense Plant Corporation (R. 37) and were thereafter transferred to Reconstruction Finance Corporation. Their acquisition and improvement was for the purpose of providing plant facilities for the use of a former Rohr Aircraft Corporation

(R. 38) in the production of war materials (R. 51). Following the termination of hostilities in World War II, the old Rohr Aircraft Corporation terminated the lease under which it occupied the premises, and the properties were turned over to Reconstruction Finance Corporation (R. 52). On May 29, 1946, Reconstruction Finance Corporation declared the properties to be surplus to its needs and responsibilities, pursuant to the Surplus Property Act of 1944 (R. 36). A photostatic copy of the Declaration so made was introduced in evidence in the trial court, and the pertinent portions of the Declaration are contained in the record here (Pl. Ex. 2; R. 36, 99-105). War Assets Administration accepted possession and control of the property, pursuant to the declaration of RFC and the provisions of the Surplus Property Act. The plant so declared surplus by RFC was used by the War Assets Administration as a depot for the warehousing, sale, and disposition of various types of surplus war material (R. 45-48). The possession and control of War Assets Administration continued through the period for which the taxes complained of by Appellant were levied and assessed. No deed was executed by Reconstruction Finance Corporation at the time it executed and delivered the declaration that the property was surplus to its needs. According to the records in the office of the County Recorder, San Diego County, no document of transfer was placed of record until a deed dated March 17, 1955, was recorded on May 6, 1955 (Def. Ex. H; R. 38, 105-108).

Commencing in May of 1948, Rohr Aircraft Corporation entered into a series of interim leases on a month-to-month basis with War Assets Administration covering portions of the property (R. 56-58). In 1949, the lease under which Rohr became a lessee of the entire property was entered into (R. 58; Pl. Ex. 1;

R. 36, 9-31). Rohr occupied the property under this lease during each of the years for which the taxes complained of were levied.

Notwithstanding the declaration of the property as surplus by Reconstruction Finance Corporation and the transfer of possession, control and accountability by it to War Assets Administration, local property taxes were levied upon the property as though it were still property of Reconstruction Finance Corporation. Appellant, under the requirements of its lease, paid the taxes so levied and assessed against the fee interest of the United States. After such payment, Appellant filed with the Board of Supervisors of the County of San Diego and with the City Council of the City of Chula Vista requests for refund of the taxes, upon the ground that the property was immune from taxation, since it was owned by the United States. These claims were denied, and thereafter Appellant filed its action in the Superior Court of San Diego County, seeking recovery of the taxes so paid. The trial court found that Reconstruction Finance Corporation did not dispose of the property until the deed executed on March 17, 1955, was recorded on May 6, 1955; that, at all times mentioned in the complaint, RFC was the record owner and holder of legal title to the property; and that the taxes which were assessed, levied, and collected by Appellees were real property taxes levied under the provisions of the Reconstruction Finance Corporation Act. Recovery of the taxes was, therefore, denied.

On appeal, the District Court of Appeal, Fourth Appellate District, noted Appellant's contention that the taxes in question were illegal and void, under the general rule that property owned by the United States or its corporate instrumentalities is immune from state or local taxes. It held that the property in question,

during the years 1951 through 1955, was not "real property of the Corporation," within the meaning of the Reconstruction Finance Corporation Act, but rather, was surplus property of the United States of America, and that the taxes were levied illegally.

The Supreme Court of California thereafter granted a hearing and, on such hearing, after considering Appellant's contention, affirmed the judgment of the trial court (R. 109).

In summary, this case involves real property taxes upon the fee interest in property acquired by an instrumentality of the United States, the Reconstruction Finance Corporation. Congress, with respect to property of that Corporation, waived Constitutional immunity from local taxation. In 1946, under mechanics adopted by the Congress in the Surplus Property Act of 1944, the Reconstruction Finance Corporation transferred the property to War Assets Administration, and that agency assumed possession and control of the property and exercised all rights with respect to it. During the time that the property was under the possession and control of the General Services Administrator (as successor to the War Assets Administrator), local taxes were levied upon the fee interest in the property, as though it still belonged to Reconstruction Finance Corporation.

The entire fee interest of the United States in the property was taxed, and the case does not involve taxation of the possessory interest of Appellant under its lease. At the trial, it was stipulated that any refund would be subject to an offset for taxes against such possessory interest, in accord with a formula agreed upon by the parties (R. 38).

The validity of the taxes as levied was upheld by the California Court, upon the ground that no effectual transfer had occurred to War Assets Administration from RFC, and that the

property still was "real property of the Corporation."

VI.

ARGUMENT

SUMMARY OF ARGUMENT

A. JURISDICTION.

1. THE ISSUE INVOLVES THE VALIDITY OF STATUTES ON THE GROUNDS OF REPUGNANCY TO THE CONSTITUTION AND LAWS OF THE UNITED STATES. The taxes levied by Appellees and here complained of were ad valorem taxes upon the entire interest of the United States in its property. Such taxes and the validity of the statutes upon the basis of which they were levied can only be justified upon the ground that the property was still beneficially owned by Reconstruction Finance Corporation and had not been transferred to War Assets Administration by virtue of a Declaration made by RFC that the property was surplus to its needs, under the mechanics provided by the Surplus Property Act of 1944. In *Reconstruction Finance Corp. v. Beaver County, infra,* this Court held that it had jurisdiction on appeal in a case involving conflicting interpretations of state and federal law, where the appeal challenged the validity of a state statute sustained by the highest court of the state. Here, also, as in *United States v. County of Allegheny, infra,* Appellant made due insistence that the California tax law, as applied, violated the Federal Constitution. The Supreme Court of California rendered final judgment against the claim of a federal right.

2. A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED. The California Constitution itself exempts from ad valorem taxes properties which are exempt under the laws of the United States. Thus, the very right of the state to tax is predicated upon the effect to be given the provisions of the Federal Constitution and laws. Also involved is the right of the Congress to deal as it sees fit and in a manner chosen by it with properties owned by it and its instrumentalities, unfettered by concepts or rules of local property law. The case thus presents an important question of federal, as opposed to state rights and the respective powers of each governmental entity.

B. LOCAL PROPERTY TAXES LEVIED DIRECTLY UPON PROPERTY OF THE UNITED STATES ARE INVALID IN THE ABSENCE OF EXPRESS CONGRESSIONAL CONSENT. Acting under the authority of state statutes, local taxes were levied by Appellees directly upon the property owned by the United States. Such levies are, under the authority of *United States* v. *County of Allegheny, infra,* invalid. Appellees gave no effect to the consequences respecting ownership which directly flowed from the voluntary Declaration made by RFC in 1946, that the property later taxed was surplus to its needs and responsibilities. Such a Declaration made under the provisions of the Surplus Property Act of 1944 accomplished a transfer of ownership. Thereafter, the waiver of immunity which the Congress had enacted with respect to real property of Reconstruction Finance Corporation was no longer applicable.

C. UPON TRANSFER OF REAL PROPERTY BY RECON-

STRUCTION FINANCE CORPORATION TO WAR ASSETS ADMINISTRATION, TAX EXEMPTION IS REINSTATED. All courts, save two, which have considered the effect of a declaration made by a federal instrumentality that property was surplus to its needs, under the provisions of the Surplus Property Act of 1944, have held that such a declaration accomplishes a transfer of ownership to the United States, and that the declaring agency retained only a bare legal title. Decisions of the Supreme Court of Michigan in *Continental Motors Corporation* v. *Township of Muskegon*, *infra*, and of the Supreme Court of California in this case below, are the only ones to the contrary. Decisions of Michigan and California are predicated upon the theory that subjection to property tax is to be founded upon concepts of legal title, as distinguished from true ownership, and upon an assumed Congressional intent. Their decisions are thus predicated upon form, rather than substance.

A.
JURISDICTION

1.

THE ISSUE INVOLVES THE VALIDITY OF STATE STATUTES ON THE GROUNDS OF REPUGNANCY TO THE CONSTITUTION AND LAWS OF THE UNITED STATES.

Under the provisions of the Constitution of California (Article XIII, Section 1) and the various sections of the Revenue and Taxation Code, set forth in Appendix A to this brief, Appellees levied upon property of the United States certain ad valorem

taxes, measured by the value of the entire fee interest in said property, and assessed them against Reconstruction Finance Corporation. Justification for such levies, if any, must of necessity be founded upon the consent of Congress contained in the Reconstruction Finance Corporation Act (15 USCA 607), by which federal constitutional immunity from local taxation upon federally-owned property was waived with respect to real property which belonged to Reconstruction Finance Corporation.

It is the contention of Appellant that, during each of the tax years involved in this cause, the properties assessed by Appellees did not belong to Reconstruction Finance Corporation, but rather, were owned by the United States by virtue of a transfer to War Assets Administration, effected under the mechanics provided by the Surplus Property Act of 1944 (Act of October 3, 1944, c. 479, 1958 Stat. 765, 50 USCA, Sections 1611, et seq.). The Supreme Court of California so interpreted the federal statutes involved and the dealings had by the various federal instrumentalities as to conclude that the properties were still owned by Reconstruction Finance Corporation and fell within the gamut of the waiver of immunity, above noted.

There is, thus, on this appeal, drawn into question the validity of the California statutes authorizing and prescribing the method of levy, assessment, and collection of taxes as against the contention that such statutes, as so applied, are repugnant to the Constitution and laws of the United States. The decision of the Supreme Court of California was in favor of the validity of the state action and statutes.

This same question was presented in *Reconstruction Finance Corp. v. Beaver County* (328 U. S. 204, 66 S. Ct. 992, 90 L. Ed. 1172). In that case, local taxing authorities of the State of

Pennsylvania had assessed certain machinery and fixtures belonging to Reconstruction Finance Corporation and located upon property owned by it, but leased to Curtiss-Wright Corporation. Assessment was predicated upon the theory that such machinery and fixtures constituted real property of RFC and, accordingly, were taxable under the waiver provisions above noted. Following a decision upholding the levies by the Supreme Court of Pennsylvania, the case was brought to this Court on appeal. A motion to dismiss was made, and this Court, speaking through Mr. Justice Black, stated:

> "By § 10 of the Reconstruction Finance Corporation Act, as amended [January 22, 1932] 47 Stat. 5, 9, c 8 [June 10, 1941] 55 Stat. 248 c 190, 15 USCA § 610, 4 FCA title 15, § 610, Congress made it clear that it did not permit states and local governments to impose taxes of any kind on the franchise, capital, reserves, surplus, income, loans, and personal property of the Reconstruction Finance Corporation or any of its subsidiary corporations. Congress provided in the same section that 'any real property' of these governmental agencies 'shall be subject to State, Territorial, County, municipal, or local taxation to the same extent according to its value as other real property is taxed.' The Supreme Court of Pennsylvania sustained the imposition of a tax on certain machinery owned and used in Beaver County, Pennsylvania, by the Defense Plant Corporation, an RFC subsidiary. The question presented on this appeal from the Supreme Court judgment is whether the Supreme Court's holding that this machinery is 'subject to' a local 'real property' tax means that the Pennsylvania tax statute, 72 Purdon's Pennsylvania Stat. (1936) 5020-201, as applied conflicts with § 10 of the Reconstruction Finance Corporation Act. This appeal, thus, challenges the validity of a state statute sustained by the highest court of the state and raises a substantial federal question. We have jurisdiction under 28 USCA § 344 (a), 8 FCA title 28, § 344 (a) and appellee's motion to dismiss is denied."

Here, as in *Beaver County*, the question involved is whether the holding of the California Court that the property taxed was the property of Reconstruction Finance Corporation conflicts with Section 607 of Title 15, USCA, and the actions taken by RFC and the War Assets Administration, under the authority of the Surplus Property Act of 1944.

Other cases have come to this Court on appeal in which jurisdiction has been noted where the question involved was the validity of local tax levies upon property of the United States: *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1611, 62 S. Ct. 1168, and *United States* v. *County of Allegheny*, 322 U. S. 174, 64 S. Ct. 908, 88 L. Ed. 1209. In the *Standard Oil* case, this Court, speaking through Mr. Justice Black, stated:

> "The California Motor Vehicle Fuel License Tax Act imposes a license tax, measured by gallonage, on the privilege of distributing any motor vehicle fuel. Section 10 states that the Act is inapplicable 'to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government.' The appellant, a 'distributor' within the meaning of the Act, sold gasoline to the United States Army Post Exchanges in California. The State levied a tax, and the appellant paid it under protest. The appellant then filed this suit in the Superior Court of Sacramento County seeking to recover the payment on two grounds: (1) that sales to the Exchanges were exempt from tax under § 10; (2) that if construed and applied to require payment of the tax on such sales the Act would impose a burden upon instrumentalities or agencies of the United States contrary to the federal constitution. Holding against the appellant on both grounds, the trial court rendered judgment for the State. The Supreme Court of California affirmed. 19 Cal(2d) 104, 119 P(2d) 329. Since validity of the State statute as construed was drawn in question on the ground of its being repugnant

to the Constitution, we think the case is properly here on appeal under § 237 (a) of the Judicial Code, 28 USCA § 344(a)."

In *United States v. County of Allegheny, supra,* the Court had, as here, postponed consideration of jurisdictional questions to the hearing on the merits, and this Court, speaking through Mr. Justice Jackson, in denying the motion to dismiss, stated:

"Our jurisdiction was questioned by appellee's motion to dismiss, and its consideration was postponed to hearing of the merits. The argument runs that the tax is laid only upon Mesta and therefore only Mesta can question its validity; that if Mesta does so, it can be only under the Fourteenth Amendment; that no question has been assigned under this Amendment and hence the appeal should be dismissed.

"The questions in this case do not arise under the Fourteenth Amendment. They depend on provisions adopted and principles settled long before the Fourteenth Amendment and which exist independently of it.

"The United States was admitted to the case as an intervenor. Both it and Mesta raised these questions of taxability, as either may do. The United States may question the taxation in order to protect its sovereignty over the property in question. Mesta as bailee is under a duty to protect the property and may protect itself from unlawful burdens put upon it because of its possession of the property. The tax is calculated and imposed on the land and machinery as a unit, the lien of the assessment on the machinery becomes a lien on the land which can be taken to pay the tax occasioned by the machinery. Since the tax must be paid out of Mesta's property it is in a position to challenge the validity of the tax, as was the case in Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 US 151, 29 L ed 845 6 S Ct 670, supra. Both Mesta and the Government made timely insistence that the Pennsylvania tax Law as applied violates the Federal Constitution. The highest court of the State rendered final judgment

against the claim of federal right. We have jurisdiction by appeal. Judicial Code, § 237(a), 28 USCA § 344, 8 FCA title 28, § 344. The motion to dismiss is denied."

Appellees, in their motion to dismiss, argue that there was no transfer of the property from RFC to War Assets Administration by reason of the Declaration of Surplus executed by RFC (Pl. Ex. 2; R. 36, 99-105) and through the proceedings taken under the Surplus Property Act of 1944, since no formal deed was given or recorded in accordance with local law. This point is more fully covered in subsequent portions of this brief. The argument ignores the provisions of Article IV, Section 3, Clause 2, of the Constitution of the United States, providing that "The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . ." This power is paramount and superior and without limitation (*United States* v. *County of Allegheny, supra*). It has clearly been established that the Federal Government, in dealing with its property and interests, is not bound by provisions of local law referring to the transfer of title and need not avail itself, if it chooses not to do so, of the provisions of local recording acts (*Detroit Bank* v. *United States*, 317 U. S. 329, 63 S. Ct. 297, 87 L. Ed. 304; *Federal Land Bank* v. *Crossland*, 261 U. S. 374, 43 S. Ct. 385, 67 L. Ed. 703; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 63 S. Ct. 573, 87 L. Ed. 838). The mechanics of transfer of federally-owned property from one agency of the Government to another is not a matter of local general law.

Appellees seem to contend that an appeal to this Court will lie only where the validity of one specific statute of a state has been drawn into question. Their contention in this regard con-

pletely ignores and overlooks the myriad of cases in which state action, taken under the authority of a body of statutory law, has been reviewed by this Court on appeal.

Penn Dairies v. *Milk Control Commission*, 318 U. S. 261, 63 S. Ct. 617, 87 L. Ed. 748.

United States v. *County of Allegheny*, 322 U. S. 174, 64 S. Ct. 908, 88 L. Ed. 1209.

Reconstruction Finance Corporation v. *Beaver County*, 328 U. S. 204, 66 S. Ct. 992, 90 L. Ed. 1172.

Wheeling Steel Corporation v. *Glander*, 337 U. S. 562, 69 S. Ct. 1291, 93 L. Ed. 1544.

Interstate Oil Pipe Line Co. v. *Stone*, 337 U. S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613.

Kern-Limerick, Inc. v. *Scurlock*, 347 U. S. 110, 74 S. Ct. 403, 98 L. Ed. 546.

Society for Savings v. *Bowers*, 349 U. S. 143, 75 S. Ct. 607, 99 L. Ed. 950.

Standard Oil Co. of California v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1611, 62 S. Ct. 1168.

It therefore appears that this case is properly before this Court on appeal, under the provisions of Subsection (2) of Title 28, USCA, Section 1257.

2.

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

In making their motion to dismiss, Appellees have not argued that a federal question is not presented. Their motion is

based upon the substance of that question.

The Constitution of California (Article XIII, Section 1) exempts from ad valorem tax properties which are exempt under the laws of the United States. The very right of the state to tax is predicated upon the effect to be given to the waiver provisions of the Reconstruction Finance Corporation Act (Title 15, USCA, Section 607) and the effect to be afforded to the Declaration of Surplus Property, made by Reconstruction Finance Corporation under the provisions of the Surplus Property Act of 1944. In *Reconstruction Finance Corporation* v. *Beaver County, supra,* the power to tax the property involved turned upon the question whether the machinery was real property or personal property. The Supreme Court of Pennsylvania held that ". . . all machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold," and was thus real property. This Court stated, "This interpretation of Pennsylvania's tax law is of course binding on us. But Pennsylvania's definition of 'real property' cannot govern if it conflicts with the scope of that term as used in the federal statute. What meaning Congress intended is a federal question which we must determine."

The Supreme Court of California chose to place its own interpretation on the federal statutes here involved, casting aside in so doing the decision of a lower Federal Court precisely in point. Appellees argue that the conflict between the decision of the Court of Claims in *Board of County Commissioners of Sedgwick County, Kansas* v. *United States* (105 Fed. Supp. 995) and the Supreme Court of the State of Michigan in *Continental Motors Corporation* v. *Township of Muskegon* (346 Mich. 141, 77 N.W. 2d 370), buttressed by that of the Supreme Court of

California in this case, does not present a substantial federal question, merely because the California Court, for its own purposes, did not feel bound to follow the Court of Claims.

Here involved is one of the basic powers granted Congress by the Federal Constitution—the right to deal with federally-owned property as the Congress sees fit, unfettered and in no wise circumscribed by concepts or rules of local property law. Also involved is a basic question in inter-governmental relationships, a problem which Mr. Justice Jackson described in *United States v. County of Allegheny, supra*, in the following manner:

> "We are called upon to solve another of the recurring conflicts between the power to tax and the right to be free from taxation which are inevitable where two governments function at the same time and in the same territory. In arguing the case of M'Culloch v. Maryland, Luther Martin, Attorney General of Maryland, himself a member of the Constitutional Convention, said, 'The whole of this subject of taxation is full of difficulties, which the Convention found it impossible to solve, in a manner entirely satisfactory. The first attempt was to divide the subjects of taxation between the State and the national government. This being found impracticable, or inconvenient, the State governments surrendered altogether their right to tax imports and exports, and tonnage; giving the authority to tax all other subjects to Congress, but reserving to the States a concurrent right to tax the same subjects to an unlimited extent. This was one of the anomalies of the government, the evils of which must be endured, or mitigated by discretion and mutual forbearance.' M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 376, 4 L ed 579, 594. Where discretion and forbearance have failed it often has fallen to this Court to determine specific cases for which the Convention was unable to agree upon a general rule. Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand.

"But since 1819, when Chief Justice Marshall in the M'Culloch Case expounded the principle that properties, functions, and instrumentalities of the Federated Government are immune from taxation by its constituent parts, this Court never has departed from that basic doctrine or wavered in its application. In the course of time it held that even without explicit congressional action immunities had become communicated to the income or property or transactions of others because they in some manner dealt with or acted for the Government. In recent years this Court has curtailed sharply the doctrine of implied delegated immunity. But unshaken, rarely questioned in this case, is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation. . . ."

Can a state, by making its own interpretation of federal law, expand the scope and effect of an express Congressional waiver beyond the original intent of Congress? If so, there would seem to be no sanctity to the doctrine enunciated in *M'Culloch v. The State of Maryland, supra.* The tests of the substantiality of the federal question involved on appeal, which this Court has in the past applied, is whether the issues have become settled, or the appeal is deemed frivolous. In view of the conflict which exists between the decisions of the Court of Claims in the *Sedgwick County* case and of the Supreme Court of Michigan in the *Continental Motors* case, it cannot be said that the issue is settled. Both the Supreme Court of Michigan and the Supreme Court of California, in this case, interpreted federal statutes so as to uphold the validity of state taxation of federally-owned property. In so doing, they have, by inference, placed limitations upon the power of Congress to effectively deal with federal property. They have stated that no transfer

has here occurred in absence of a formal deed, given and recorded in accordance with the requirements of local property law. Their holdings in this regard are at variance with the decision of the Court of Claims in the *Sedgwick County* case and, also, at variance with the holdings of other federal courts which are cited and discussed in subsequent portions of this brief.

The decision of the California Court is but typical of that which can be expected from other state courts that might have occasion to consider similar problems. Competition for sources of revenue as between the federal, state, and local governments is such that each is seeking to advance its own self-interest. The major premise of our Federal Constitution is that the interests of our nation are paramount. This preeminence cannot exist if the various states are, in the light of local self-interest, permitted to adopt their own views as to the interpretation of federal enactments. A lessee is less apt to pay a fair rental to the United States for the use of its property if the fee interest of the government is to be taxed rather than the value of the possessory interest held by the lessee. Thus, in the instant case, if this lessee were leasing from an agency of the State of California, it would pay only a tax measured by the possessory interest in that property—the value of its leasehold. Here, however, this lessee, who has leased property belonging to the United States, is obligated to pay a tax measured by the full value of the fee interest; whereas, other lessees of similar properties pay a lesser tax.

Thus is the competition for revenues supporting local governmental budgets typified. At every opportunity, local courts can be expected to construe state and local statutes in a manner which adds to local revenues. The recognition of Constitutional exemptions is not voluntary. It must be prescribed. Only this

Court can write the prescription. Couched though it is in terms of a recoupment by a private corporation, the question here presented is of national importance in its effect upon the impact of the efforts of local governmental bodies to reach federal properties heretofore considered immune. Congressional consent to the taxation of federally-owned properties must be strictly construed (*Reconstruction Finance Corp.* v. *Texas*, 229 F. 2d 9; cert. den. 351 U. S. 907, 76 S. Ct. 695, 100 L. Ed. 1442). When the United States gives consent that only certain of its properties may be taxed, that consent should not be permitted to be expanded and enlarged beyond its original scope. The only effective control of such a problem lies in the decision of this Court establishing the proper interpretation of the federal statutes which are here involved and the right of the federal government to deal in its own properties, unfettered by the requirements of local property law. This question should not be permitted to be resolved by a state court whose action is taken in the light of local self-interest. The problem is one of national interest and importance, which should be resolved by this Court.

B.

LOCAL PROPERTY TAXES LEVIED DIRECTLY UPON PROPERTY OF THE UNITED STATES ARE INVALID IN THE ABSENCE OF EXPRESS CONGRESSIONAL CONSENT.

Of particular application to the problem here presented is *United States* v. *County of Allegheny*, *supra*. There, the United States had furnished Mesta Machine Company, its contractor,

with certain machinery and equipment used by Mesta in the manufacture of munitions. Mesta was permitted to use the equipment for the manufacture of guns and for no other purpose, without consent of the United States. Mesta's liability for loss, damage, or destruction was designed as that of a bailee under a mutual-benefit bailment. On termination of the agreement, Mesta was to remove and ship the equipment according to government directions. The State of Pennsylvania levied ad valorem taxes upon the machinery and assessed those taxes to Mesta. The taxes were paid under protest. The Supreme Court of Pennsylvania upheld the levies, pointing out that, regardless of who held title to the property, it was properly assessed as real estate, and that the assessment was against Mesta, not the United States. On appeal to this Court, Mr. Justice Jackson stated:

> "We do not determine whether, under Pennsylvania law, the retention of possession by Mesta would protect only good-faith purchasers or lienors who relied upon it or whether, as urged by the amici, it also makes the Government's title imperfect as against these taxing authorities, who were fully advised of the Government's claim before the assessment was made. Even if the latter were true, we do not think the state law would be decisive of the question of title.
>
> "The Constitution provides that 'The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .' Art. 4, § 3, cl. 2. It also gives Congress the power 'To make all Laws which shall be necessary and proper for carrying into Execution' all powers vested in the Government or in any department or officer thereof, Art. 1, § 8, cl. 18, and it makes the laws of the United States enacted pursuant thereto 'the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary nothwithstanding.' Art. 6, cl. 2.

"Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. In this case no contention is made that the contract with Mesta is not fully authorized by the congressional power to raise and support armies and by adequate congressional authorization to the contracting officers of the War Department. It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute.

"Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state. (Citations omitted) Federal statutes may declare liens in favor of the Government and establish their priority over subsequent purchasers or lienors irrespective of state recording acts. (Citations omitted) Or the Government may avail itself, as any other lienor, of state recording facilities, in which case, while it has never been denied that it must pay nondiscriminatory fees for their use, the recording may not be made the occasion for taxing the Government's property. (Citations omitted)

"We hold that title to the property in question is in the United States and is effective for tax purposes."

The taxes levied under the statutes here complained of were imposed by Appellees directly upon the property of the United States. The burden of the taxes is borne directly by the property itself, as demonstrated by the provisions of state law which are set forth in Appendix A. The State of California has a very complete and effective procedure for the seizure of and

foreclosure upon property which has been taxed and the taxes not paid. A more effective levy would be difficult to devise.

It is claimed, however, that such levies were authorized by the express waiver contained in the Reconstruction Finance Corporation Act. The Congressional waiver of immunity in question is expressed in the following terms: "Any real property *of the Corporation* shall be subject to . . . county, municipal, or local taxation to the same extent according to its value as other real property is taxed (15 USCA, Section 607. Emphasis supplied)." The issue then is whether the property so taxed constituted real property of the Reconstruction Finance Corporation, within the meaning of the Congressional waiver. What constitutes property "of" the Corporation? This question must be answered in the light of the purposes which the Congress had in mind at the time the RFC was created. One of the first cases which this Court considered in that connection was *Baltimore National Bank v. State Tax Commission of Maryland* (297 U. S. 209, 56 S. Ct. 417, 80 L. Ed. 586). The case involved the taxability by Maryland of shares of a national bank purchased and held by RFC. The court, in upholding the validity of the state tax, based its decision upon another statute (not the specific waiver with respect to property of the RFC, which would have exempted this particular class of property)—it held that the provisions of the Congressional Act authorizing the taxation of "all" shares of a national bank were fully effective, notwithstanding the subsequent enactment of the waiver provisions of the Reconstruction Finance Corporation Act. In so doing, it described the purpose and function of that governmental corporation in the following terms:

"The Reconstruction Finance Corporation was organ-

ized in 1932 to give relief to financial institutions in a national emergency and for other and kindred ends. . . . At the time of its creation and continuously thereafter the United States has been and is the sole owner of its shares. The purpose that it has aimed to serve is not profit to the government, though profit may at times result from one or more of its activities. The purpose to be served is the rehabilitation of finance and industry and commerce, threatened with prostration as the result of the great depression. . . ."

With the advent of World War II, these functions were expanded, in that RFC became an agency through which facilities for the production of war materials were provided. At or about the time of the declaration by RFC that the property here involved was surplus to its needs, the Hoover Commission had, by its recommendation which was accepted by Congress, sounded the death knell of RFC. It was under these circumstances that RFC declared this property to be surplus to its needs.

The Constitutional immunity of property owned by the federal corporations organized by the Congress to perform governmental functions is described in an article by Harold W. Stoke, appearing in 22 Iowa Law Review, page 39 (1937). Mr. Stoke concluded:

"Thus it would seem to be clear that all the corporations created by the federal government which have a legitimate basis, serve as agents in the performance of some power conferred by the Constitution. As agents of the federal government exercising powers delegated by the Constitution, they are performing functions which can only be classified as governmental. And in performing governmental functions they are, under the doctrines of the Supreme Court, exempt from the taxing powers of the states save as Congress may waive that immunity. . . . If the court determines that any particular agency of the federal government has a

legitimate existence, it can hardly deny that it is carrying into execution some necessary and proper governmental power. And under its own rulings, if the governmental character of an instrumentality is established, tax exemption follows as a matter of course."

Were it not for the provisions of the waiver section (15 USCA 607) property of or owned by RFC would receive identical treatment at the hands of local taxing authorities as post-offices, military bases, or other properties clearly exempt. What then was intended by the Congress in its enactment of the waiver provisions? Words of title were not used, but rather, a simple preposition—"of." This Court has had occasion to consider that preposition in *Poe* v. *Seaborn* (282 U. S. 101, 51 S. Ct. 58, 75 L. Ed. 239). There involved was the taxation under the federal income tax laws of income derived by husband and wife who were residents of the State of Washington. They had filed separate returns, splitting the husband's earnings as between them. The Commissioner of Internal Revenue determined that all of the income should have been reported in the husband's return and made an additional assessment against him accordingly. He claimed a refund and, on its rejection, filed suit. This Court, on appeal, stated:

> "The case requires us to construe § § 210 (a) and 211 (a) of the Revenue Act of 1926 and apply them, as construed, to the interests of husband and wife in community property under the law of Washington. These sections lay a tax upon the net income of every individual. The act goes no farther, and furnishes no other standard or definition of what constitutes an individual's income. The use of the word 'of' denotes ownership. It would be a strained construction, which, in the absence of further definition by

Congress, should impute a broader significance to the phrase."

The decision was unanimous (two Justices not participating), and the Court, in reaching its conclusion that one-half of the income was that *of* the wife, analyzed her property interests under the Washington concept of community property. It recognized that she had the right to transmit at death her half, and that, while her husband had the management and control of community personal property, his powers were subject to restrictions which were inconsistent with denial of the wife's interest as an equal co-owner. It concluded that one-half of the income was the property *of* the wife. The same considerations should be here applied.

Following termination by the old Rohr Aircraft Corporation (predecessor of Appellant) of the lease which it held from Defense Plant Corporation, Reconstruction Finance Corporation, on May 29, 1946, declared the properties to be surplus to its needs and responsibilities (Pl. Ex. 2; R. 36, 99-105). This Declaration was made because of the requirements of the Surplus Property Act of 1944 (Act of October 3, 1944, c. 479, 58 Stat. 765, 50 USCA, Sections 1611, et. seq., Appendix A) and, presumably, because RFC no longer had any use for the property in the performance of its functions. After receipt of the Declaration, War Assets Administration accepted the properties and responsibility for their control, management, and disposition. Indeed, the Administrator of War Assets actually utilized the premises as a depot for the disposal of surplus war material (R. 46-48). No formal deed, given under the requirements of local law, was ever made or recorded until 1955 (Def. Ex. H;

R. 38, 105-108). Appellees contend that, since no deed was given by RFC to the United States until after the tax years here involved, the property still was property of the Reconstruction Finance Corporation, notwithstanding the transfer under the provisions of the Surplus Property Act, and fell within the terms of the Congressional waiver of immunity with respect to property *of* RFC.

What consequences flowed from the Declaration made by RFC that the property was surplus to its needs and responsibilities? Possession was transferred, and the Administrator of War Assets assumed through his employees full use of the property. Under the terms of the Surplus Property Act of 1944, in effect at the time the Declaration was made, the War Assets Administration had the responsibility and authority for the *disposition* of the property and for its care and handling, pending disposition. The Act also provided that the disposal agency (here War Assets Administration) "may execute such documents for the transfer of title or other interest in the property or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise carry out the provisions of this Act, and in the case of surplus property, shall do so to the extent required by the regulations of the Board." (Act of October 3, 1944, c. 479, Sec. 15, as amended, 58 Stat. 772, 50 USCA, Sec. 1624 (b)).

The Congress, and the courts, in using the terms "property of," "owner," and synonymous terms, have referred to a variety of meanings. Such words are comprehensive and generic, subject to a wide variety of construction. By and large, however, they refer to one having dominion over a thing; to one having the right of enjoyment and disposition; to one who has full do-

minion over property, with a right to sell or otherwise dispose of it without accountability to anyone; to one who, in case of destruction of the property, must sustain the loss; to one who is entitled to the primary benefits which are associated with ownership—namely, the right to enjoy, its proceeds. All of these rights were, under the authority of the Surplus Property Act of 1944 and by the voluntary act of RFC in declaring this property surplus, vested in War Assets Administration, an independent agency of the United States.

In the instructions which constitute a part of the Declaration actually made (Pl. Ex. 2; R. 36, 105), it is stated:

> "13. If the net proceeds from the sale or transfer of surplus real property are reimbursable pursuant to Section 30 (b) of the Surplus Property Act of 1944, give the symbol and title of the appropriation to be credited, or the name and address of the Government corporation to receive the proceeds."

One of the basic attributes of title and ownership is the right to enjoy unfettered use of the property and its proceeds. Since the actual Declaration made by RFC involving this particular property is completely silent, insofar as that agency's claiming any right of reimbursement is concerned, it would appear that, under the provisions of Section 30 of the Surplus Property Act (Appendix A), all proceeds were covered into the Treasury of the United States as miscellaneous receipts. RFC did not and could not reap any benefits. It had effectively disposed of any attributes of ownership, and the property was no longer "real property of the Corporation."

Whatever theory be utilized (apart from that which rests entirely upon "record title" or "legal title"), it becomes plain

that, after it declared the properties here involved surplus to its needs in 1946, Reconstruction Finance Corporation had none of the incidence of ownership, save the fact that the property originally had been acquired by it. It did not have possession. It did not have control. It did not have responsibility for repairs, maintenance, or upkeep. It did not have the right to enjoy either the income from the property or proceeds of its disposition, and, indeed, under the express terms of the Surplus Property Act, the Administrator of War Assets could, by his act alone, convey full and complete title to others, without any act on the part of Reconstruction Finance Corporation. Thus, in the framework of the Surplus Property Act of 1944, the Congress provided the full and complete mechanics by which various governmental agencies or subsidiary corporations were directed to transfer property no longer needed by them to the War Assets Administration. In so doing, Congress was exercising the rights granted by the Constitution: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." This is a power which has many times been described by this Court as paramount. Thus, in *United States* v. *California* (332 U. S. 19, 67 S. Ct. 1658, 91 L. Ed. 1889), it was stated:

> "We have said that the constitutional power of Congress in this respect is without limitation. . . . Thus neither the courts nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power."

Appellees have pointed to the provisions of Section 405 of the Revenue and Taxation Code of the State of California:

"Annually, the assessor shall assess all the taxable property in his county, except State assessed property, to the persons owning, claiming, possessing, or controlling it at 12 o'clock meridian of the first Monday in March. The assessor shall ascertain such property between the first Mondays in March and July." (Appendix A)

The courts of California, however, have not followed the concept that the attribution to a private taxpayer of bare record or legal title, possession, or control alone, or in combination, justify the taxation of property where true beneficial ownership lies in an exempt government agency. Thus, in *C. C. Moore & Co., Engineers* v. *Quinn* (149 Cal. App. 2d 666, 308 P. 2d 781), component parts of certain machinery in the possession of a contractor and belonging to several municipalities were assessed to the contractor. The court held that the tax levies were invalid and, in so doing, stated:

"The passing of technical legal title to the unassembled parts is not necessarily involved in the present problem, for under section 405 of the Revenue and Taxation Code, the assessor is empowered to assess property 'to the person owning, claiming, possessing or controlling it' on the first Monday in March. When it is considered that the appellant had no right to remove the parts, much less to transfer title thereto, and that the cities reserved absolute control prior to assembly of the parts, it can only be concluded that the true, beneficial interest was in the respective cities rather than in the appellant contractor whose only duty was to assemble the parts.

"The Douglas Aircraft opinion, just cited, contains an interesting discussion of such beneficial, possessory interests, making that case applicable not only to the Burbank contract but likewise to the Glendale and Los Angeles contracts under which appellant was operating. The airplane parts, like the boiler parts here involved, were but portions of a

component whole in which the beneficial interest or 'usufructuary right' as phrased in the Douglas case, was in the government rather than the contractor. It is this interest, rather than any technical legal concept of title, which should furnish the determinatory factor."

This Court has recently, in *Kern-Limerick, Inc.* v. *Scurlock* (347 U. S. 110, 74 S. Ct. 403, 98 L. Ed. 546), taken occasion to clarify the proper basis for the construction of local taxing statutes:

"A comment should be made about another excerpt from King & Boozer. It was referred to in the Arkansas opinion as though it were effective for the determination of this case. The quotation is this:

"'The soundness of this conclusion turns on the terms of the contract and the rights and obligations of the parties under it. The taxing statute, as the Alabama courts have held, makes the "purchaser" liable for the tax to the seller, who is required "to add to the sales price" the amount of the tax and collect it when the sales price is collected, whether the sale is for cash or on credit. Who, in any particular transaction like the present, is a "purchaser" within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority.' Id. 314 U. S. at 9, 10.

"Read literally, one might conclude this Court was saying that a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign. Such a conclusion as to the meaning of the quoted words would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest. The quotation refers, we think, only to the power of the state court to determine who is responsible under its law for payment to the state of the exaction.

* * *

"The doctrine of sovereign immunity is so embedded in constitutional history and practice that this Court cannot subject the Government or its official agencies to state taxation without a clear congressional mandate. No instance of such submission is shown."

In *United States* v. *Detroit* (355 U. S. 466, 495, 505; 78 S. Ct. 474, 486; 2 L. Ed. 2d 424, 460) and the companion cases, this Court rejected the concept, for tax purposes, that title to property and its ownership was an indivisible whole. In each of those cases legal title to the property taxed was in the United States. The taxes levied by the State of Michigan and its subdivisions were upheld as levies upon the right of private contractors to use the property, even though the taxes were measured by the full value of the property used. On this ground, the Court distinguished *United States* v. *County of Allegheny*, supra:

"In urging that the tax assessed here be struck down the appellants rely primarily on United States v. Allegheny County, 322 U. S. 174, 88 L. ed 1209, 64 S Ct 908, but we do not think that case is at all controlling. In Allegheny the Court ruled invalid a tax which the State did not contend was 'anything other than the old and widely used ad valorem general property tax' to the extent it was laid on government property in the hands of a private bailee. Reviewing all the circumstances the Court concluded that the tax was simply and forthrightly imposed on the property itself, not on the privilege of using or possessing it. . . ."

No question is involved here of any tax upon Appellant's right to use the property under the terms of the lease. As noted, the parties have stipulated in the trial court (R. 38) that, if the levies are determined to be invalid, an appropriate offset is to be allowed, representing the proper tax computed upon the value

of Appellant's possessory interest under the lease. Thus, the tax here is squarely imposed upon the property itself. The property was beneficially that of the United States and did not constitute real property of the Reconstruction Finance Corporation.

C.

UPON TRANSFER OF REAL PROPERTY BY RECONSTRUCTION FINANCE CORPORATION TO WAR ASSETS ADMINISTRATION, TAX EXEMPTION IS REINSTATED.

In adopting the Surplus Property Act of 1944, the Congress provided for a complete system under which various properties acquired by the myriad of different owning agencies in furtherance of the war effort could be effectively and systematically disposed of. Each agency had the duty and responsibility continuously to survey its property and determine which was surplus to its needs and responsibilities. Once it made a determination that it no longer required any particular property, a declaration, in the form here involved was executed by the owning agency and transmitted to the War Assets Administrator.

Upon receipt of the declaration, the Surplus Property Administrator had the duty of determining whether that declaration would be accepted. Here it was. Upon acceptance, the War Assets Administration had the full responsibility and authority for disposition of the property and for its care and handling, pending disposition, in accordance with regulations prescribed by the Surplus Property Board (Appendix A, Section 11, Surplus Property Act of 1944, and Regulations issued thereunder). The Surplus Property Act of 1944 provided by express

enactment of the Congress for the complete assumption by War Assets Administration, an agency of the United States (completely separate and apart from RFC), of all of the incidence and attributes of ownership upon a Declaration of Surplus. The wellspring of this consequence was the Declaration of Surplus, and not any formal deed.

The effect of such a declaration was considered in *United States* v. *Shofner Iron & Steel Works* (9 Cir. 168 F. 2d 286). There, the United States brought an action to recover certain real property located in the State of Oregon. The property had been originally acquired by and legal title was in Defense Plant Corporation, which had leased it to Shofner. Reconstruction Finance Corporation, as successor to Defense Plant Corporation, terminated Shofner's lease in 1945, but consented that it remain in possession until a definite date in 1946. On May 24, 1946, the property was declared surplus by RFC and jurisdiction over it transferred to War Assets Administration. Shofner, having overstayed its permissive use, was sued in the name of the United States for possession. Shofner moved for a dismissal, upon the ground that the United States was not the real party in interest, since legal title still remained in Reconstruction Finance Corporation, a separate corporate instrumentality of the United States. The court summarily disposed of this contention, stating:

> "Under the circumstances disclosed in its complaint at any rate there can be no doubt that the United States was entitled to sue in its own name. Reconstruction Finance Corporation is a wholly-owned agency of the government. Having declared the property surplus to its needs and responsibilities, that corporation retains no more than barren legal title for the use of the United States to be transferred whenever the latter may direct. The responsibility and au-

thority for disposing of the property and for its care and handling pending disposal are by the terms of the Surplus Property Act vested in the War Assets Administration, an executive arm of the government, and Congress could not but have intended that the Administration take possession of the property declared surplus whenever it deemed that course necessary or expedient. Its functions could not be performed or its responsibilities discharged otherwise."

The effect of a Declaration of Surplus was again before the courts in *Board of County Commissioners of Sedgwick County, Kansas* v. *United States* (Court of Claims, 105 Fed. Supp. 955). That case involved the precise question which is now before this Court. The property there involved was acquired in 1942, by the Defense Plant Corporation, and a manufacturing plant was constructed on the property and leased to Boeing Aircraft Company. On August 21, 1946, Reconstruction Finance Corporation, as successor to Defense Plant Corporation, declared the property to be surplus to its needs and responsibility, under the provisions of the Surplus Property Act of 1944. The War Assets Administrator thereupon accepted responsibility for the property, and thereafter Reconstruction Finance Corporation had neither the physical possession, control, or custody, nor the right to use the property. No further actions with respect to the property occurred until 1948, when the War Assets Administrator, acting for himself, and on behalf of Reconstruction Finance Corporation, executed a deed covering the property to the United States. During all of the time in question, the property remained leased to Boeing Aircraft. The case involved the taxable status of the property for the years 1944, 1945, 1946, and 1947. The court held that the property was taxable under the express provisions of the waiver contained in the Reconstruction

Finance Corporation Act, for the years 1944, 1945 and 1946, but that for 1947 following the Declaration of the property as surplus by Reconstruction Finance Corporation the waiver was no longer applicable, and the property thereafter exempt:

"The law did not require that the RFC execute a deed of the property upon its transfer to the control of the WAA, and the RFC continued after April 16, 1947, as the 'owning agency' within the meaning of the Surplus Property Act—apparently as a matter of convenience to the government and to minimize actual paper work and expense until the WAA made final disposition of the property. While a bare legal title for the use of the United States may have thus remained in the RFC from April 16, 1947, until February 25, 1948, when the property was transferred to the Department of the Air Force, nevertheless the entire responsibility for the care and handling, and disposition of the property was in the WAA during that period. *United States* v. *Shofner Iron & Steel Works*, 9 Cir., 168 F. 2d 286, 287.

"The waiver of constitutional immunity from taxes on 'real property of the Corporation' enacted with respect to the RFC in 1932, 47 Stat. 10, was undoubtedly intended to apply to that real property of the corporation held by it in the performance of the duties and responsibilities imposed upon it by law. But by the . . . declaration of the property as surplus under the Surplus Property Act, 58 Stat. 765, enacted some 12 years after 47 Stat. 10, RFC declared that the property was surplus to its 'needs and responsibilities,' and . . . was divested of all control and responsibility. At no time after the acceptance by the WAA . . . did the RFC or any of its employees have physical possession, control, or custody of the property. It had neither the use nor the right to use the property. It could not even withdraw the declaration of surplus property without the approval of the War Assets Administrator, 32 C. F. R., 1946 Supp. 8301.5(b).

"There is no indication that Congress intended to waive immunity from taxation under these circumstances . . . Such

a situation could not even have arisen at the time the waiver provision was enacted, and was made possible only by the enactment of the Surplus Property Act some 12 years later. The purpose of the waiver provision had been fully served when the property passed to the control of the WAA.

"Upon consideration of these factors we cannot presume that Congress intended the waiver provision with respect to 'real property of the Corporation' to extend to the lands in question after they passed to the responsibility and authority of the WAA . . . . Thus we hold that the cloak of immunity descended upon the property on that day and no tax liability for the property could arise thereafter."

The *Sedgwick County* case was considered in the opinion of the Supreme Court of Michigan in the case of *Continental Motors Corporation* v. *Township of Muskegon* (346 Mich. 141, 77 N. W. 2d 370). The facts of that case are almost identical with the *Sedgwick County* case. The Defense Plant Corporation had built the facilities there in question, which were transferred to Reconstruction Finance Corporation by operation of law. In June of 1948, Reconstruction Finance Corporation declared the property surplus, and it was accepted by War Assets Administration. Continental Motors Corporation continued in occupancy. The Michigan Court came to the conclusion that, since legal title was still in RFC, the waiver provisions of the Reconstruction Finance Corporation Act were still applicable, and the property remained taxable. It refused to follow the decision of the *Sedgwick County* case and, in so doing, considered that the intent of Congress in originally enacting the waiver provisions of the Reconstruction Finance Corporation Act was still pertinent; that the waiver was made in order to prevent prejudice to local economic conditions and was founded on a realization of the hardship resulting from the removal of such property from local tax rolls

and the throwing of a heavy burden on taxpayers, generally. It pointed to the continued occupancy by Continental Motors Corporation and stated that no reason was apparent why the waiver of immunity should have been terminated at the time the property was declared surplus. The court also felt that the revocation of the waiver could not be accomplished "by mere implication." It felt that Congress, in enacting the Surplus Property Act of 1944, could not have intended that the Declaration of Surplus have the effect of removing property from the scope of the waiver. It refused to analyze the effect of the waiver and the provisions of the Surplus Property Act in relation to the true concepts of ownership of real property, and the plenary power of Congress to deal with federally-owned property.

The Supreme Court of California reached a similar conclusion, and for similar reasons.

Both the Michigan and California Courts paid scant heed to the express language and effect of the waiver and conjured an assumed Congressional intent, largely out of whole cloth. The California Court relied heavily on their assumption that the disposal agencies left legal title in RFC for the sole purpose of continuing the tax immunity waiver until final disposition of the property. This reasoning ignores the principle enunciated by the Court that only the Congress can, by express enactment, waive the immunity of the Federal Government from local taxation. As stated in *United States* v. *County of Allegheny*, supra:

> "We find no support for the claim that the immunity has been waived. Congress certainly has not done so. It is true that the contract requires Mesta to obey and abide by the 'applicable' law of Pennsylvania. But such language does not require Mesta to submit to unconstitutional exac-

tions. It clearly is inadequate to waive federal immunity, even if we assume a contracting officer had power to do so. Likewise any contractual obligation of the War Department to pay Mesta's taxes does not operate either to waive or to create an immunity.

* * *

"Appellees, and especially the amici, on the other hand, point for a different purpose to the amount of Government property in war production. It is said that increased municipal services, to serve and protect the influx of war workers, are required in all communities where large war contracts of this type are placed; that such local services rely heavily on real estate taxation; that to exclude property such as this, together with the large real estate holdings that have been and are being acquired by the Government, imposes this increased cost on others. While validation of assessments of this character will measurably increase the cost of waging the war, it is argued that the Federal Government may diffuse the cost throughout the country instead of putting a backbreaking burden on local governments where war plants are located. For these reasons we are urged to hold the position of the Government 'unsound, as well as inequitable.'

"Such considerations remind us of our heavy responsibility in deciding the issues but hardly provide a guide or alter the usual principles for decision. The equities in this unfortunate conflict between the United States and one of its most important industrial communities are not capable of judicial ascertainment or equalization. Whether a county loses more than it gains by such federal activity, and what other federal benefits ought to be considered if a balance were to be struck between advantages and disadvantages, we cannot say. The adjustment of benefits and burdens is for other departments, and studies to that end have been undertaken. We can only say that our constitutional system as judicially interpreted from the beginning leaves no room for the localities to impose either compensatory or retaliatory taxation on Government property interests. Their remedy

lies in petition to the Federal Congress, which also is their Congress."

It is obvious that the Congress, in enacting the waiver provisions of the Reconstruction Finance Corporation Act, intended that the waiver should apply only to property which was beneficially owned by and used in performing the functions of the Reconstruction Finance Corporation. This construction was recognized by the New York Court in *People v. ex rel. Mergenthaler Linotype Co. v. Mills* (118 N. Y. S. 2d 444, 281 App. Div. 167). In that case, the Secretary of War had, at the request of Reconstruction Finance Corporation (it not having the power of eminent domain), condemned the property in question, using for that purpose funds furnished by Defense Plant Corporation. For the year 1943, the property was carried on the local tax rolls as being exempt, since title was vested in the United States. In 1944, the Secretary of War executed a conveyance to Defense Plant Corporation. Thereafter, and on ascertaining the facts, the local taxing authorities assessed taxes for all years, including those during which title was in the United States. The assessments were sustained as being made pursuant to the provisions of Section 607 of Title 15, USCA—the waiver provisions of the Reconstruction Finance Corporation Act. The court stated: "The delay in making the conveyance by the Secretary of War did not alter the fact that the title in the United States was held for immediate transfer to Defense Plant Corporation." Here is a case where legal title was in the United States, yet because of beneficial ownership which RFC had, the property was taxable. Appellant contends that the converse should be equally true.

This Court has repeatedly pointed out that questions involv-

ing taxation of property are to be resolved upon substance, and not form. When the provisions of the Surplus Property Act of 1944 are analyzed, it is plain that all of the various incidence, rights, and powers, which are associated with the concept of property ownership, were taken away from Reconstruction Finance Corporation, through its own voluntary act in executing the Declaration of Surplus. After the declaration, the United States, and not the RFC, had possession, control of, and was accountable for the property. The United States stood the risk of loss, and it was entitled to all of the benefits flowing from the property. Further, as is seen from the *Shofner* case, supra, the War Assets Administrator could convey good title by his act alone. In considering the effect of the declaration, it should be borne in mind that the Congress, in adopting the waiver provisions of the Reconstruction Finance Corporation Act, did not use or refer to the strict "record title" concept of ownership. The waiver is couched in possessive and beneficial terms—"real property of the Corporation." If the interpretation of the California and Michigan Courts is allowed to stand, the original intent of Congress in providing for the waiver will be materially expanded, and form, rather than substance, applied. As stated by Mr. Justice Holmes in *Corliss v. Bowers* (281 U.S. 376, 50 S. Ct. 336, 74 L. Ed. 916):

> "But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxes —the actual benefit for which the tax it paid."

See also *Helvering v. Clifford* (309 U.S. 331, 60 S. Ct. 554. 84 L. Ed. 788).

It has long been a rule adhered to by this Court that, where the United States has, by final certificate, parted with equitable title in government lands to a person subject to state taxation,

and the United States retains only a barren legal title by its delay in issuing a patent, the property is, none the less, subject to local taxation. *Irwin* v. *Wright* (258 U. S. 219, 42 S. Ct. 293, 66 L. Ed. 573), *Northern Pacific Railway Co.* v. *Myers* (172 U. S. 589, 19 S. Ct. 276, 43 L. Ed. 564), *Hussman* v. *Durham* (165 U. S. 144, 17 S. Ct. 253, 41 L. Ed. 644).

All of the cases dealing with governmental tax immunity, where the tax is levied directly upon the property owned by the government (save and except only the decisions of the Supreme Courts of Michigan and California in the two cases here noted) turn upon the question of beneficial ownership—not barren legal title. That rule should be here applied.

CONCLUSION

In summary, it is Appellant's position that the property here involved was subjected to an invalid direct taxation at a time when beneficial ownership in that property war held by the United States. The declaration made by RFC in 1946, that the property was surplus to its needs and responsibilities was an effective transfer to the United States which must be recognized by local taxing authorities. To hold otherwise would be to impose on the United States requirements of local law in connection with the transfer of properties from one federal instrumentality to another. The several states should not be permitted to determine for themselves the consequences which flow from such transfers. The admonition of Justice Holmes in his dissenting

opinion in *Panhandle Oil Co. v. Mississippi* (277 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857, 859) that "The power to tax is not the power to destroy while this court sits" is here particularly apt.

The judgment should be reversed, and the cause remanded in the court below, with instructions that judgment be entered in favor of Appellant for the amount determined in accordance with the stipulation of the parties respecting Appellant's possessory interest.

Respectfully submitted,

LEROY A. WRIGHT,
Attorney for Appellant.

APPENDIX

APPENDIX A

Provisions, seriatim, of the Revenue and Taxation Code of California (Deering's Revenue and Taxation Code) under the authority of which local real property taxes are assessed, levied, and collected. Section numbers are the sections of the Code, and the parenthetic reference is to the statutes of the State of California by which the sections were adopted or amended.

§ 201. All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code. (Stats. 1939, Ch. 154, Sec. 201.)

§ 401. Except as provided in this part, all taxable property shall be assessed at its full cash value. (Stats. 1939, Ch. 154, Sec. 401.)

§ 404. All taxable property, except State assessed property, shall be assessed by the assessing agency of the taxing agency where the property is situated. (Stats. 1939, Ch. 154, Sec. 404.)

§ 405. Annually, the assessor shall assess all the taxable property in his county, except State assessed property, to the persons owning, claiming, possessing, or controlling it at 12 o'clock meridian of the first Monday in March. The assessor shall ascertain such property between the first Mondays in March and July. (Stats. 1941, Ch. 1240, Sec. 2.)

§ 601. The assessor shall prepare an assessment roll, as directed by the board, in which shall be listed all property within

the county which it is the assessor's duty to assess. (Stats. 1939, Ch. 1008, Sec. 5.)

§ 602. This local roll shall show:

(a) The name and address, if known, of the assessee.

(b) Land, by legal description.

(c) A description of possessory interests sufficient to identify them.

(d) Personal property. A failure to enumerate personal property in detail does not invalidate the assessment.

(e) The cash value of real estate, except improvements.

(f) The cash value of improvements on the real estate.

(g) The cash value of improvements assessed to any person other than the owner of the land.

(h) The cash value of possessory interests.

(i) The cash value of personal property, other than intangibles.

(j) The revenue district in which each piece of property assessed is situated.

(k) The total taxable value of all property assessed, exclusive of intangibles.

(l) The actual value of solvent credits, after legal deductions for debts.

(m) Any other things required by the board. (Stats. 1939, Ch. 1008, Sec. 19.)

§ 611. If the name of an absent owner is known to the assessor, or in the case of real property, if it appears of record in the office of the county recorder, the property shall be assessed to such owner, otherwise, the property shall be assessed to unknown owners. (Stats. 1941, Ch. 169, Sec. 1.)

§ 612. When a person is assessed as agent, trustee, bailee, guardian, executor, or administrator, his representative designation shall be added to his name, and the assessment entered separately from his individual assessment. (Stats. 1939, Ch. 154, Sec. 612.)

§ 613. A mistake in the name of the owner or supposed owner of real estate does not render invalid an assessment or any tax sale. (Stats. 1939, Ch. 154, Sec. 613.)

§ 2151. The board of supervisors shall fix the rates of county and district taxes and shall levy the State, county, and district taxes as provided by law. (Stats. 1939, Ch. 154, Sec. 2151.)

§ 2152. The auditor shall then:

(a) Compute and enter in a separate column on the roll the respective sums in dollars and cents, rejecting the fractions of a cent, to be paid as a tax on the property listed. Notwithstanding any contrary provisions elsewhere set forth in the law, all rates applicable to any assessment may be combined into a single figure for purposes of computation and extension of the roll.

(b) Place in other columns the respective amounts due in installments.

(c) Foot each column, showing the totals.

Provided, however, that if the assessment roll is a machine-prepared roll the above prescribed computations and entries may be made and entered upon a newly prepared roll which shall incorporate the adjustments authorized by the local board of equalization. (Stats. 1957, Ch. 321, Sec. 6.)

§ 2186. Every tax has the effect of a judgment against the person. (Stats. 1939, Ch. 154, Sec. 2186.)

§ 2187. Every tax on real property is a lien against the property assessed. (Stats. 1939, Ch. 154, Sec. 2187.)

§ 2188. Every tax on improvements is a lien on the taxable land on which they are located, if they are assessed to the same person to whom the land is assessed. (Stats. 1939, Ch. 154, Sec. 2188.)

§ 2602. The tax collector shall collect all property taxes except as otherwise expressly provided. (Stats. 1939, Ch. 154, Sec. 2602.)

§ 2605. The following taxes on the secured roll are due November 1st:

(a) All taxes on personal property.

(b) Half the taxes on real property, and if the amount is not evenly divisible by two, the odd cent is also due unless the roll shows the odd cent as part of the second installment. (Stats. 1949, Ch. 246, Sec. 1.)

§ 2606. The second half of taxes on real property on the secured roll is due February 1st. (Stats. 1941, Ch. 1240, Sec. 5.5; and Stats. 1953, Ch. 799, Sec. 1.)

§ 2607. The entire tax on real property may be paid when the first installment is due. The second installment may be paid separately only if the first installment has been paid. (Stats. 1941, Ch. 1240, Sec. 6.)

§ 3351. Annually, on or before June 8th, the tax collector shall:

(a) Make an affidavit, endorsed on the delinquent roll,

or the secured roll if the delinquent roll has been dispensed with, that the taxes not marked "paid" have not been paid.

(b) Publish the following information relating to each assessment of property on which the taxes are unpaid:

(1) The name of the assessee, and where there is more than one valuation the name of the assessee need be listed only once.

(2) The description of the property.

(3) The total amount due which is a lien on the property as shown on the delinquent or the secured roll if the delinquent roll has been dispensed with.

This information required to be published is the "published delinquent list." If the amount due on any property on the published delinquent list is paid, the information relating to the property may be omitted from any subsequent publications. (Stats. 1949, Ch. 240, Sec. 1.)

§ 3352. With the published delinquent list, the tax collector shall publish a notice, specifying:

(a) That unless the taxes, penalties, and costs are paid the real property on which they are a lien will be sold.

(b) The time and place at which the property will be sold to the State by operation of law. (Stats. 1939, Ch. 154, Sec. 3352.)

§ 3355. The published notice of deeding to the State of tax-sold property shall show:

(a) A list of descriptions of the property. The assessments contained in this notice of deeding shall be numbered in ascending numerical order.

(b) That five or more years will have elapsed on the date of the deed since the property was sold to the State.

(c) The year of sale to the State and the fiscal year for which the taxes were levied.

(d) That the property will be deeded to the State, unless sooner redeemed or an installment plan of redemption is initiated.

(e) The time at which the property will be deeded to the State.

(f) That the amount for which the deed will be issued will be the amount of taxes, delinquent penalties, and costs for which it was sold to the State.

(g) The amount for which the property is to be deeded, opposite the description of the property.

(h) That if the property is deeded to the State, the right of redemption will terminate upon any subsequent sale by the State.

(i) The date of the notice.

(j) The official who will furnish all information concerning redemption. (Stats. 1949, Ch. 243, Sec. 3)

§ 3436. Not less than 21 nor more than 28 days after the first publication of the published delinquent list, at the time fixed in the publication, the real property on which the taxes, assessments, penalties, and costs have not been fully paid, except tax sold property and possessory interests, shall by operation of law and the declaration of the tax collector be sold to the State. The sale shall be in the tax collector's office. (Stats. 1939, Ch. 154, Sec. 3436)

§ 3511. Not less than 21 days nor more than 35 days after the first publication of the notice of deeding of tax-sold property and at least five years after the property was sold to the State, the tax collector shall, without charge, execute a deed in duplicate

conveying the property to the State. The county clerk shall take acknowledgment of the deed without charge. (Stats. 1951, Ch. 598, Sec. 6)

§ 3513. In addition to the usual provisions of a deed conveying real property, the deed shall specify:

(a) The date of sale to the State.

(b) That the property was duly assessed for taxation and the tax legally levied.

(c) The year the property was assessed for taxation and the name of the assessee for that year.

(d) That the property was sold to the State for nonpayment of delinquent taxes which were a lien on the real property.

(e) The amount for which the property was sold to the State unless there has been a partial cancellation of taxes or a redemption from a portion thereof, in either of which events, the amount shall be the balance remaining.

(f) That five or more years have elapsed since the sale to the State and no person has redeemed the property.

(g) That the property is therefore conveyed to the State according to law. (Stats. 1949, Ch. 242, Sec. 1)

§ 3517. The deed, duly acknowledged or proved, is prima facie evidence that:

(a) The property was assessed as required by law.

(b) The property was equalized as required by law.

(c) The taxes were levied in accordance with law.

(d) The taxes were not paid.

(e) At a proper time and place the property was sold as prescribed by law.

(f) The property was not redeemed.

(g) The person who executed the deed was the proper officer.

(h) That the amount for which the property was sold was legally a lien on the real property. (Stats. 1939, Ch. 154, Sec. 3517)

§ 3518. The deed, duly acknowledged or proved, is conclusive evidence, except against actual fraud, of the regularity of all other proceedings from the assessment of the assessor to the execution of the deed, both inclusive. (Stats. 1939, Ch. 154, Sec. 3518)

§ 3651. After the recording of the deed to the State, the State has exclusive power through the Controller to rent tax-deeded property and to receive all proceeds arising in any manner from the property except proceeds from a transaction terminating the right of redemption, if the right of redemption has not been terminated, or from a sale of a parcel of tax-deed property. (Stats. 1941, Ch. 290, Sec. 25)

§ 3653. The Controller or any person designated by him may demand possession of tax deed property and possession shall be surrendered in accordance with the demand. (Stats. 1939, Ch. 154, Sec. 3653)

§ 3654. On the request of the Controller to the Attorney General or to the district attorney of the county in which any part of the land is located, an action of unlawful detainer or of ejectment shall be brought in the name of the people against any persons unlawfully occupying tax deeded property. (Stats. 1939, Ch. 154, Sec. 3654)

Pertinent provisions of Surplus Property Act of 1944 (Act of October 3, 1944, 58 Stat., Chapter 479):

§ 3. As used in this Act—

(a) The term "Government agency" means any executive department, board, bureau, commission, or other agency in the executive branch of the Federal Government, or any corporation wholly owned (either directly or through one or more corporations) by the United States.

(b) The term "owning agency," in the case of any property, means the executive department, the independent agency in the executive branch of the Federal Government, or the corporation (if a Government agency), having control of such property otherwise than solely as a disposal agency.

(c) The term "disposal agency" means any Government agency designated under section 10 to dispose of one or more classes of surplus property.

(d) The term "property" means any interest, owned by the United States or any Government agency, in real or personal property, of any kind, wherever located, but does not include (1) the public domain, or such lands withdrawn or reserved from the public domain as the Surplus Property Board (created by section 5) determines are suitable for return to the public domain for disposition under the general land laws, or (2) naval vessels of the following categories: Battleships, cruisers, aircraft carriers, destroyers, and submarines.

(e) The term "surplus property" means any property which has been determined to be surplus to the needs and responsibilities of the owning agency in accordance with section 11.

* * *

(g) The term "care and handling" includes completing, repairing, converting, rehabilitating, operating, maintaining, preserving, protecting, insuring, storing, packing, handling,

and transporting, and, in the case of property which is dangerous to public health or safety, destroying, or rendering inocuous, such property.

§ 4. Surplus property shall be disposed of to such extent, at such times, in such areas, by such agencies, at such prices, upon such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act.

* * *

§ 6. The activities of the Board shall be coordinated with the programs of the armed forces of the United States in the interests of the war effort. Until peace is concluded the needs of the armed forces are hereby declared and shall remain paramount. The Board shall have general supervision and direction, as provided in this Act, over (1) the care and handling and disposition of surplus property, and (2) the transfer of surplus property between Government agencies.

* * *

§ 10. (a) Except as provided in subsection (b) of this section, the Board shall designate one or more Government agencies to act as disposal agencies under this Act. In exercising its authority to designate disposal agencies, the Board shall assign surplus property for disposal by the fewest number of Government agencies practicable and, so far as it deems feasible, shall centralize in one disposal agency responsibility for the disposal of all property of the same type or class.

* * *

§ 11. (a) Each owning agency shall have the duty and responsibility continuously to survey the property in its control and to determine which of such property is surplus to its needs and responsibilities.

(b) Each owning agency shall promptly report to the Board and the appropriate disposal agency all surplus property in its control which the owning agency does not dispose of under section 14.

* * *

(d) When any surplus property is reported to any disposal agency under subsection (b) of this section, the disposal agency shall have responsibility and authority for the disposition of such property, and for the care and handling of such property pending its disposition, in accordance with regulations prescribed by the Board. Where the disposal agency is not prepared at the time of its designation under this Act to undertake the care and handling of such surplus property the Board may postpone the responsibility of the agency to assume its duty for care and handling for such period as the Board deems necessary to permit the preparation of the agency therefor.

* * *

§ 15. (a) Notwithstanding the provisions of any other law but subject to the provisions of this Act, whenever any Government agency is authorized to dispose of property under this Act, then the agency may dispose of such property by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such

other terms and conditions, as the agency deems proper: *Provided, however,* That in the case of raw materials, consumer goods, and small tools, hardware, and nonassembled articles which may be used in the manufacture of more than one type of product, no extension of credit under this Act shall be for a longer period than three years.

(b) Any owning agency or disposal agency may execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the Board.

* * *

§ 30. (a) All proceeds from any transfer or disposition of property under this Act shall be covered into the Treasury as miscellaneous receipts, except as provided in subsections (b), (c), and (d) of this section.

(b) Where the property transferred or disposed of was acquired by the use of funds either not appropriated from the general fund of the Treasury or appropriated from the general fund of the Treasury but by law reimbursable fom assessment, tax, or other revenue or receipts, then upon the request of the interested agency the net proceeds of the disposition or transfer shall be credited to the reimbursable fund or appropriation or paid to the owning agency. As used in this subsection the term "net proceeds of the disposition or transfer" means the proceeds of the disposition or trans-

fer minus all expenses incurred for care and handling and disposition or transfer.

Pertinent provisions of regulations issued by War Assets Administrator under the authority of the Surplus Property Act of 1944 (Code of Federal Regulations, 1949 edition, Title 44, Chapter IV):

§ 401.3 *Designation of disposal agencies; continental United States.* The following Government agencies are hereby designated as disposal agencies for surplus property located within the continental United States: *Provided*, That the Administrator may assign any real property to any of the disposal agencies designated in this part regardless of its classification whenever the Administrator shall determine such assignment appropriate to facilitate disposal:

(a) *Patrol vessels: Navy Department.* . . .

(b) *Ships and maritime personal property; Maritime Commission and War Assets Administration.* . . .

(c) *Agricultural, forest, grazing and mineral property; Department of Agriculture.* . . .

(d) *All other property; War Assets Administration.* (1) The War Assets Administration is hereby designated as disposal agency for all real and personal property of every type and classification located in the continental United States, declared surplus by owning agencies, except those types and classifications specifically assigned to other disposal agencies under this part: . . .

* * *

§ 401.7 *Withdrawals* * * *. (b) *Real property.* A

request by an owning agency for the withdrawal of a declaration of surplus real property shall be transmitted to the Administration by the filing of WAA Form 1005 (formerly Form SPB-5) containing justification for the requested withdrawal. The Administration, after consideration of the request and any additional evidence deemed appropriate, shall approve or disapprove the request and notify the owning agency accordingly.

* * *

§ 401.11 *Proceeds to be covered into Treasury.* Except as provided in subsections (b), (c) and (d) of section 30 of the Act, all proceeds from transfer or disposition of property under the Act (including rents, interest, other proceeds) shall be set aside in the special fund account in the Treasury, authorized in the First Deficiency Appropriations Act of 1946 (59 Stat. 632). Sums deducted from gross proceeds under section 30 (b) of the Act to determine net proceeds shall be set aside in such special fund account in the Treasury. Under no circumstances may a disposal agency designated by the Administrator retain all or any part of the proceeds from any transfer or disposition under the Acts as reimbursement for the cost or expense of care, handling, disposition or transfer of surplus property. Deposits or other payments forfeited by the purchaser shall not be considered to be proceeds from transfer or disposition of surplus property; such forfeitures shall not be set aside in a special fund account in the Treasury but shall be covered into miscellaneous receipts of the Treasury.

* * *

§ 403.4 *Declarations*—(a) *General.* Declarations of surplus real property and surplus personal property located therein or thereon shall be filed with the Administrator as provided in Part 401 of this chapter. Such property shall be declared surplus subject to any outstanding rights of refusal or options to purchase or otherwise acquire the property, and nothing in this part shall be deemed to impair the right of any person to exercise any valid right of refusal or option.

(b) *Reservations, restrictions, conditions; industrial plants.* (1) In connection with the declaration of shipyards, plants, and equipment hereunder the Secretary of Defense may direct the imposition of such terms, conditions, restrictions and reservations on the disposal of the property as will, in his judgment, be adequate to assure the continued availability of such property for war production purposes as may be required in the interest of national defense.

(2) In the event the disposal agency is unable to dispose of any such industrial plant and equipment subject to such terms, conditions, restrictions, or reservations within a reasonable time, it shall notify the Secretary of Defense, indicating such modifications in the terms, conditions, restrictions, or reservations which, in its judgment, would make possible disposal of the plant. The Secretary of Defense shall thereupon either (i) consider and agree to any or all such proposed modifications; or (ii) direct the transfer of such plant or equipment in the manner described in Public Law 883, 80th Congress.

• • •

§ 403.9 *Duties of owning and disposal agencies*—(a) *Care and handling.* Upon the filing of an acceptable declaration of surplus property as provided in § 403.4, the Administration or the disposal agency shall work out with the owning agency mutually satisfactory agreements for the assumption by the Administration or the disposal agency of the physical custody and control of, and accountability for, the property covered by the declaration. The owning agency shall take necessary steps to insure the reasonable preservation and safety of the property pending assumption of the physical custody by the designated disposal agency. Any agreements made between an owning and disposal agency which postpone the date on which such disposal agency shall be responsible for the physical care and handling of such property shall not postpone such date for more than ninety (90) days from the date when the acceptable declaration is filed, unless the prior approval of the Administration is obtained. . . .

(d) *Transfer of title papers, documents, etc.* Upon request of the disposal agency, and consistent with any necessary restrictions in the interest of national security, the owning agency shall supply the disposal agency with the originals or true copies of all documents or portions thereof pertaining to the property in the possession of the owning agency and copies of which have not been filed with the declaration. These may include leases, permits, appraisal reports, abstracts of title, tax receipts, deeds, affidavits of title, copies of judgments in condemnation proceedings, maps, surveys, and such other papers as may relate to the property. All such papers

and documents which may still be needed by the owning agency shall be returned to it as soon as the needs of the disposal agency have been satisfied. The disposal agency may transfer to the purchaser of the property, as a part of the disposal transaction, any abstract of title, or title guaranty or title insurance policy, which relates to the property being transferred and which is no longer needed either by the owning agency or the disposal agency. The terms upon which such a transfer shall be made shall be fixed by the disposal agency.

* * *

§ 403.12 *Priorities—(a) Order of priority.* In disposing of surplus real property the following priorities shall be recognized:

(1) Government agencies shall be accorded first priority to acquire all classes of surplus real property for their own use. . . .

APPENDIX B

IN THE

DISTRICT COURT OF APPEAL

FOURTH APPELLATE DISTRICT,
STATE OF CALIFORNIA
CIVIL NO. 5492

ROHR AIRCRAFT CORPORATION,
a California Corporation,
Plaintiff and Appellant,

vs.

COUNTY OF SAN DIEGO, a Body Corporate, and CITY OF CHULA VISTA, a Municipal Corporation,
Defendants and Respondents.

Dist. Court of Appeal—
Fourth Dist.

FILED
Oct. 9, 1958
E. J. Verdeckberg, Clerk

OPINION

Appeal from a judgment of the Superior Court of San Diego County, Arthur L. Mundo, Judge. Reversed with directions.

Action to obtain refund of tax payments.

Glenn & Wright for Appellant.

James Don Keller, District Attorney and County Counsel of San Diego County; Carroll H. Smith, Deputy; and Manuel L. Kugler, City Attorney of the City of Chula Vista, for Respondents.

This is an action to recover taxes paid by appellant, Rohr Aircraft Corporation, to the respondents, County of San Diego and City of Chula Vista, under an alleged illegal assessment.

During the years 1951 to 1955, inclusive, appellant occupied certain land and improvements, adjoining its plant in Chula Vista, under a written lease dated September 1, 1949, between "Reconstruction Finance Corporation . . . and the United States of America, both acting by and through the General Services Administrator" as lessor, and said Rohr Aircraft Corporation, as lessee. By the provisions of this lease the lessee agreed to pay "all taxes, assessments and similar charges . . . taxed, assessed or imposed upon lessor or lessee with respect to or upon the leased premises." For the fiscal years 1951-1952, through 1954-1955, the Rohr Aircraft Corporation paid taxes levied by respondents upon the leased premises, pursuant to assessments thereon against Reconstruction Finance Corporation, which was a federal agency.

Thereafter, Rohr Aircraft Corporation duly presented to the proper authorities claims for a refund of the amounts so paid, contending that the taxes levied against the property were illegal

and void; the claims were denied; this action was instituted to recover the payments; judgment denying recovery was rendered; and from this judgment the corporation has appealed.

This case does not involve the taxation of the possessory interest of the lessee under the aforesaid lease. At the trial it was stipulated that any refund would be subject to an offset for taxes against such possessory interest, in accord with a formula agreed upon by the parties.

Appellant contends that the taxes in question were illegal and void under the general rule that, lands owned by the United States of America, or its corporate instrumentalities, are immune from State or local taxes. (*M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Van Brocklin v. Anderson, Com'r of Revenue*, et al, 117 U. S. 151, 6 S. Ct. 670; *Clallam County, Wash. v. United States*, 263 U. S. 341, 44 S. Ct. 121; *Gottstein v. Adams*, 202 Cal. 581, 584.) Excepted from this immunity are those lands which Congress has consented may be subject to such taxation. (*Western L. Co. v. State Bd. of Equalization*, 11 Cal. 2d 156, 158.) Respondents contend that the property in question comes within the exception; that it was owned by the Reconstruction Finance Corporation; that the Reconstruction Finance Corporation Act expressly subjects it to local taxation (Act Jan. 22, 1932, sec. 8, as amended, 47 Stat. 10, 15 U. S. C. A. Sec. 607); and that it was legally taxed. (Art. XIII, Sec. 1, Calif. Const; *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, 25 Wash. 2d 652, 171 P. 2d 838, 842, 845.)

The congressional waiver of immunity in question was expressed in the following terms: ". . . Any real property *of the* corporation shall be subject to . . . county, municipal, or local taxation to the same extent according to its value as other real

property is taxed." (Act Jan. 22, 1932, sec. 8, as amended, 47 Stat. 8, 15 U.S.C.A. Sec. 607.) (Italics ours.)

The issue for determination on appeal is whether the premise described in the aforesaid lease constituted real property "of the" Reconstruction Finance Corporation, within the meaning of said section 8 of the Act, during the time the taxes in question were levied. A decision upon this issue necessitates a consideration of the factual and legal background involved.

In 1942 and 1943, a former Rohr Aircraft Corporation, the predecessor of appellant, by grant deeds, conveyed the real property in question to the Defense Plant Coporation, a federal agency. This agency improved the property and leased it to the grantor corporation for use during World War II. In June, 1945, the Defense Plant Corporation was dissolved and all of its assets were transferred to Reconstruction Finance Corporation, mother federal agency. (Act June 30, 1945, c. 215, 59 Stat. 310, 15 U.S.C.A. Sec. 611(n).) It does not appear that the transfer of title to the real property was effected by the execution of a deed. On October 15, 1945, the lease by Defense Plant Corporation to Rohr Aircraft Corporation was terminated; the premises were vacated by the lessor; and the property was turned over to the Reconstruction Finance Corporation. On May 29, 1946, the latter corporation declared the premises to be surplus property under the Surplus Property Act of 1944. (Act October 3, 1944, c. 479, 58 Stat. 765, 50 U.S.C.A. secs. 1611, et seq.) In the latter part of the same year the War Assets Administration, a federal instrumentality designated as a disposal agency to accept property declared to be surplus under that Act, took possession of the premises and thereafter used them as a storage facility and sales center for surplus property. No deed was executed trans-

ferring title.

The declaration by the Reconstruction Finance Corporation and acceptance of the property by War Assets Administration were done pursuant to the provisions of the Surplus Property Act of 1944, as amended and then existing, under which that corporation, and similar government agencies, had "the duty and responsibility continuously to survey the property in its control and to determine which of such property (was) surplus to its needs and responsibilities." (Act October 3, 1944, c. 479, sec. 11, 58 Stat. 769, 50 U.S.C.A. sec. 1629.); and was required to promptly report to the War Assets Administration, which then was the appointed disposal agency, all such surplus property in its control not disposed of under specific authorization inapplicable to the present situation. (Ibid. sec. 1620(c).) The report in question was filed on a prescribed form entitled "Declaration of Surplus Real Property." When any surplus property was so reported the disposal agency had the "responsibility and authority for the disposition of such property, and for the care and handling of such property pending its disposition, in accordance with regulations prescribed by the War Assets Administrator." (Ibid. sec. 1620 (d).) The statute also provided that the "disposal agency may execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act and, in the case of surplus property, shall do so to the extent required by the War Assets Administrator." (Act October 3, 1944, c. 479, sec. 15, as amended, 58 stat. 772, 50 U.S.C.A. Sec. 1624(b).)

The War Assets Administration occupied the premises in question exclusively during the year 1947 and the first part of

1948. The Rohr Aircraft Corporation did not occupy the property from October 15, 1945, when its lease with Defense Plant Corporation was terminated, until May, 1948, when it began renting parts thereof on a month to month basis. Subsequent negotiations with the War Assets Administration resulted in extending the areas of occupancy from time to time, and the execution of interim leases on a month to month basis, to cover such extensions. Further negotiations with War Assets Administration culminated in the execution of the lease of the whole property to appellant, the present Rohr Aircraft Corporation, by the General Services Administrator acting for the Reconstruction Finance Corporation and the United States of America. This is the lease of September 1, 1949, under which the tax payments in question were made.

In the meantime Congress had repealed parts of the Surplus Property Act of 1944, and enacted the Federal Property and Administrative Services Act of 1949 (Act June 30, 1949, c. 288, 63 Stat. 378, 41 U.S.C.A. secs. 201, et seq., which, in 1950, were transferred to titles 5 and 40 U.S.C.A. and renumbered) which created a General Services Administration and an Administrator of General Services (Act June 30, 1949, Title I, sec. 101, 63 Stat. 379, 41 U.S.C.A. sec. 211); transferred the functions, property and commitments of War Assets Administration to the General Services Administration, and the functions of the War Assets Administrator to the Administrator of General Services (Act June 30, 1949, c. 288, Title I, sec. 105, 63 Stat. 381, 41 U.S.C.A. sec. 215); authorized the Administrator to delegate his functions, or those of the administration, to other executive agencies (Act June 30, 1949, c. 288, Title II, sec. 205, 63 Stat. 389, 41 U.S.C.A. sec. 235); directed that all policies, procedures and directives

theretofore prescribed, with respect to surplus property, should remain in full force and effect until superseded (Act June 30, 1949, c. 288, Title VI, sec. 601, 63 Stat. 399, 41 U.S.C.A. sec. 203); provided that "The Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this chapter. The care and handling of surplus property, pending its disposition, and the disposal of surplus property, may be performed by the General Services Administration or, when so determined, by the Administrator, (or) by the executive agency in possession thereof . . . any executive agency designated or authorized by the Administrator to dispose of surplus property may do so by sale, exchange (or) lease . . . upon such terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or other interest in property, . . . as it deems necessary . . ." (Act June 30, 1949, c. 288, Title II, sec. 203, 63 Stat. 385, 41 U.S.C.A. sec. 233); also provided that where disposition of surplus property "has been by lease . . . the Administrator shall administer and manage such . . . lease . . . and may enforce, adjust, and settle any right *of the Government* (not of the Reconstruction Finance Corporation) with respect thereto in such manner and upon such terms as he deems in the best interest *of the Government*" (Act June 30, 1949, c. 288, Title II, sec. 204, 63 Stat. 388, 41 U.S.C.A. sec. 234); and directed the Administrator to "advise and consult with interested federal agencies with a view to obtaining their advice and assistance in carrying out the purposes of this chapter." (Act June 30, 1949, c. 288, Title II, sec. 205, 63 Stat. 389, 41 U.S.C.A. sec. 235.) (Italics ours.)

The lease of September 1, 1949, states that the lessors, Reconstruction Finance Corporation *and* the United States of America are "both acting by and through the General Services Administrator under and pursuant to the powers and authority contained in the provisions of the Federal Property and Administrative Services Act of 1949, and the Surplus Property Act of 1944"; recites that the premises therein described have been declared "surplus property *of the Government* of the United States," and are included "in the types of surplus property which *have been assigned* to War Assets Administration for disposal"; and that the "Department of Air Force had determined that the use of the leased premises by the lease herein is necessary for the production of military equipment for the National Defense"; and is signed by a director of disposals of War Assets Administration under a delegation of authority from War Assets Administration, which authorized him "to execute . . . any . . . lease . . . or other instrument in writing in connection with the care, handling and disposal of surplus real property . . . and do . . . any other act necessary to effect the transfer of title to any such surplus real . . . property . . ." (Italics ours.)

On March 17, 1955, which was after levy of the taxes under consideration in this case, the Reconstruction Finance Corporation, by a quitclaim deed, conveyed any interest it might have in the property in question to the United States of America.

Appellant contends that, upon the filing of the surplus property declaration and the entry into possession by War Assets Administration, the land and improvements under discussion ceased to be "real property of the" Reconstruction Finance Corporation within the meaning of the statute subjecting such property to taxation by local governments.

Respondents contend that this land and improvements continued to be subject to local taxation until execution of the quitclaim deed on March 17, 1955, and cite the case of *Continental Motors Corporation* v. *Township of Muskegon* [1956] 346 Mich. 141, 77 N. W. 2d 370, in support of their contention. The facts of the cited case, although similar, are not identical to those in the case at bar. In the Michigan case the Defense Plant Corporation built a plant which was transferred to Reconstruction Finance Corporation by operation of law; the latter corporation declared the property surplus and it was accepted by War Assets Administration in June, 1948. Upon the dissolution of its subsidiary, which was some considerable time prior to the surplus property declaration, the Continental Motors Corporation had commenced its occupation of the property under a lease to the subsidiary from the Defense Plant Corporation and, as related by the court, "such use and occupancy has continued to the present time. The record does not indicate that any material change in operations has taken place." (Ibid. 77 N. W. 2d 370, 372.) Although a lease dated April 1, 1949, by Reconstruction Finance Corporation, acting "by and through the War Assets Administrator," to Continental Motors Corporation, was surrendered as of November 1, 1950, from the foregoing statement by the court, and the fact that the latter corporation sought a refund of taxes assessed for the year 1953, we must conclude that it remained in continuous possession. In holding that the property there in question was subject to local taxation under section 8 of the Reconstruction Finance Corporation Act, the Michigan Supreme Court relied upon its finding that Congress consented to local taxation of federal property for the public good; "to prevent prejudice to local economic conditions" and a realization of the

hardship resulting from the removal of such property from the tax rolls which is "embarrassing to the functioning of local governments, and results in throwing a heavy burden on taxpayers generally," (Ibid. 77 N. W. 2d 370, 374) and, respecting the case before it, stated that "Declaring the property in question to be surplus did not operate to change the general purpose or character of its use. It continued to be occupied by Continental Motors as lessee, and that corporation continued to carry out the operations indicated by the agreements made by it with the Federal government through the latter's agencies. No reason is apparent why the waiver of immunity should have been terminated at that time. From the standpoint of local economy and well-being precisely the same reasons existed as during the prior years when it was assessed under the State law and taxes were paid without question." (Ibid. 77 N. W. 2d 370-374). The same argument would support the obviously untenable contention that the property was taxable even though, coincidentally with its surplus property declaration, the Reconstruction Finance Corporation had executed a deed conveying it to the United States of America. The real question for determination in the cited case, as in the case at bar, was whether the property had ceased to be "real property of the corporation," within the meaning of the Act which subjects it to local taxation at the time of the levy under consideration.

Equally nonresponsive to the determinative issue was the Michigan court's consideration of the intention of Congress concerning the effect of the Surplus Property Act of 1944 on the provisions of said section 8 of the Reconstruction Finance Corporation Act, and its conclusion that "The waiver of immunity from taxation involved in the instant case came into being by

express action of Congress. It is, we think, inconceivable that that body contemplated the revocation of such waiver by mere implication." (Ibid. 77 N. W. 2d 370, 376). Respondents, relying on the cited case, contend that this court must determine whether or not there is an implied repeal of the express congressional consent to levy a local tax on real property of the Reconstruction Finance Corporation when it is declared surplus and custody thereof transferred to the War Assets Administration. It is our opinion that no question of an "implied repeal" is involved in the decision of this case.

The tax levies under consideration here were made against surplus real property which had been disposed of by a lease made pursuant to the provisions of the Federal Property and Administrative Services Act; the terms and conditions of which were those agreed upon in accordance with the procedure prescribed by that Act; a lease executed under the authority of the Liquidator of War Assets, a federal official acting under a delegation of authority from the Administrator of General Services, who was vested with supervision and direction over the disposition of surplus property; and a lease subject to the administration and management of said Administrator who had authority to enforce, adjust, and settle any right *of the Government*—not of the Reconstruction Finance Corporation—with respect thereto, in such manner and upon such terms as he deems in the best interest *of the Government.*

The Department of Air Force had determined that the use of the leased premises was necessary for the production of military equipment. This was not a function of Reconstruction Finance Corporation.

It will be noted that, during the negotiations for the execu-

tion of, or occupancy under the lease, Reconstruction Finance Corporation neither was entitled to, under the law, nor did it actually control or manage the property in any way whatsoever. Prior to this lease, that corporation had declared the property "surplus to its needs and responsibilities." Thereupon War Assets Administration entered into exclusive possession of the premises; used them for its needs; and subsequently negotiated for and executed interim leases respecting the same.

The War Assets Administration, General Services Administration, and officials acting for them referred to the premises as "surplus property *of the Government*" (not of the Reconstruction Finance Corporation), and as included in the types of surplus property which *have been assigned* to War Assets Administration for disposal. (Italics ours.)

The fact that the corporation did not execute a deed, quit-claiming any interest it had in the property to the United States of America, until March 17, 1955, is inconsequential to a determination of the issue at bar when compared with other facts in the case. The only title in the Reconstruction Finance Corporation was that vested by an Act of Congress transferring to it all assets of the Defense Plant Corporation (Pub. Law 109, 79th Congress, i. e., Act June 30, 1945, c. 215, 59 Stat. 310. See note 15 U.S.C.A. Sec. 611, p. 115.) It does not appear that any instrument evidencing such transfer of title ever was placed of record in this state. None was necessary. The corporation was a government agency. "That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely Governmental purposes." (*Cherry Cotton Mills, Inc. v. United States*, 327 U. S. 536, 539, 66 S. Ct. 729, 730.) Any

title to, rights in, control over, or use of the "real property *of the corporation*" was subject to termination, transfer, regulation or limitation by whatsoever method Congress designated. (*United States v. Allegheny County*, [Pa.] 322 U. S. 174, 64 S. Ct. 908, 913.) By the Surplus Property Act of 1944, and the Federal Property and Administrative Services Act of 1949, Congress decreed that property of the corporation might be declared surplus and thereupon another agency of government would take custody and control thereof, with exclusive authority to dispose of the same and to execute such documents as it deemed necessary to transfer title. Whatever was left after such a declaration, within reason or the intent of Congress, may not be described as "real property *of the corporation*." (Italics ours.) This residue was referred to as a "barren title" in the case of *United States v. Shofner Iron & Steel Works*, 168 Fed. 2d 286, 287, which involved the right of the government to bring an action for possession of real property declared surplus by the Reconstruction Finance Corporation, where the court said: "Having declared the property surplus to its needs and responsibilities, that corporation retains no more than the barren legal title for the use of the United States to be transferred wherever the latter may direct." Pertinent, but not mentioned by the court, was the fact that Congress, in the Surplus Property Act, had designated an agent other than the Corporation to transfer the title, in substance reducing the status of the latter in relation to the property to that of a fictitious entity.

If the Reconstruction Finance Corporation had been a private corporation and as such subject to local taxation, having only that interest in the property in question which the evidence in this case shows it did have, i.e., a bare legal title subject to transfer by an

agent over which it had no control, the primary rights of ownership therein being vested in the Government, as was the fact in this case, that property would not have been subject to local taxes. (*Johns Hopkins University v. Board of County Commissioners* [Md.] 45 Alt. 2d 747.) It is unreasonable to believe that Congress intended to subject property to local taxation because the bare legal title thereto was vested in a governmental agency, instead of in a private corporation.

The only reasonable conclusion which may be drawn from the facts and the law in this case is that the property in question, during the years 1951 through 1955 was not "real property of the Corporation" within the meaning of section 8 of the Reconstruction Finance Corporation Act, but rather, was surplus property of the United States of America.

This conclusion is in accord with the decision of the Court of Claims in *Board of County Commissioners of Sedgwick Co., Kansas v. United States*, 105 Fed. Supp. 995, cited by appellant. The facts in the cited case are substantially similar to those of the case at bar except that in the former the lessee was in continuous possession before as well as after the surplus property declaration, and War Assets Administration did not dispose of the surplus property until after the levy of the taxes which were the subject of the action. The facts in the case at bar more firmly support our conclusion. In the cited case the court said (Ibid. p. 1001):

> "The waiver of Constitutional immunity from taxes of 'real property of the corporation' . . . was undoubtedly intended to apply to that real property of the corporation held by it in the performance of the duties and responsibilities imposed upon it by law. But by the August 21, 1946, declaration of the property as surplus . . . the RFC declared that the prop-

> erty was surplus to its 'needs and responsibilities,' and by the acceptance of April 16, 1947, was divested of all control and responsibility. At no time after the acceptance by the WAA on April 16, 1947, did the RFC or any of its employees have physical possession, control, or custody of the property. It had neither the use nor the right to use the property. It could not even withdraw the declaration of surplus property without the approval of the War Assets Administrator. (32 CFR, 1946 Supp. 8301.15(b).)" And also that "The purpose of the waiver provision had been fully served when the property passed to the control of WAA.
>
> "Upon consideration of these factors we cannot presume that Congress intended the waiver provision with respect to 'real property of the corporation' to extend to the lands in question after they passed to the responsibility and authority of WAA."

The taxes under consideration in this case were levied illegally. Appellant is entitled to recover the difference between the taxes paid and those which it should have paid on its possessory interest. (*Parr-Richmond Industrial Corporation v. Boyd*, 43 Cal. 2d 157, 169.)

The judgment is reversed with instructions to the trial court to enter judgment in favor of appellant in such amount as that court may determine in accord with this decision, the stipulation of the parties respecting appellant's possessory interest, and the law in the premises.

COUGHLIN

J. Pro Tem.

WE CONCUR:

GRIFFIN

P. J.

RUSSELL

J.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 295

ROHR AIRCRAFT CORPORATION, APPELLANT

v.

COUNTY OF SAN DIEGO, A BODY CORPORATE, AND CITY OF CHULA VISTA, A MUNICIPAL CORPORATION

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of California (R. 109-114) is officially reported at 51 Cal. 2d 759. The opinion of the intermediate California court, the District Court of Appeal for the Fourth Appellate District (Juris. St. 27-41), is not officially reported, but is unofficially reported at 330 P. 2d 291. The opinion of the Superior Court for San Diego County (Juris. St. 42-46) is not officially reported.

JURISDICTION

The judgment of the Supreme Court of California was entered on March 17, 1959 (R. 109-114; 115).

Appellant's petition for rehearing was denied on April 15, 1959 (R. 115). Notice of appeal was filed on June 12, 1959 (R. 115–118). Appellant's jurisdictional statement was filed on August 10, 1959, and by an order entered on October 19, 1959, this Court postponed consideration of the question of its jurisdiction to the hearing on the merits (R. 118). Jurisdiction of this Court is asserted under 28 U.S.C. 1257(2).[1]

QUESTION PRESENTED

Whether the statutory waiver of federal immunity from state taxation provided with respect to real property of the Reconstruction Finance Corporation was applicable to property which had been declared surplus and surrendered to the War Assets Administration for disposal, although a formal deed had not been executed.

STATUTES INVOLVED

Sections 3 (e) and (g), 6, 9(b), 13(b), 15 (a) and (b), and 30(a) of the Surplus Property Act of 1944; Section 8 of the Reconstruction Finance Corporation Act of 1932; and Sections 3 (e), (g) and (h), 105, 203 (a), (b), (c), (d) and (j), and 204(a) of the Federal Property and Administrative Services Act of 1949 are set forth in the Appendix, *infra*, pp. 20–23.

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[1] The fact that review is sought through an appeal raises a question whether the decision below involved the constitutionality of the California tax laws or merely the construction of the federal law waiving immunity from taxation as to specific property. We do not discuss this question of jurisdiction since it seems more appropriate for the appellant to support his choice of procedure. In any event, it appears that it is open to the Court to treat the Appeal as a petition for a writ of certiorari under 28 U.S.C. 2103.

STATEMENT

During World War II, the Reconstruction Finance Corporation, through a subsidiary, the Defense Plant Corporation, acquired real property in San Diego County, California, which it improved and leased to a predecessor of the appellant (R. 51–52). In 1945 this lease was terminated and possession of the property was transferred back to the Reconstruction Finance Corporation (R. 52).

The Reconstruction Finance Corporation on May 29, 1946, declared the property to be surplus under the terms of the Surplus Property Act of 1944 (R. 99–100) and transferred actual possession and control of it to the War Assets Administration (R. 40). The War Assets Administration actually used the property for storage purposes and as a sales center for surplus property (R. 46–47). By the Federal Property and Administrative Services Act of 1949, the duties, functions, records and properties of the War Assets Administration were transferred to the General Services Administration on July 1, 1949. Thereafter, on September 1, 1949, the real property was leased to the same company that had previously operated the plant (R. 69). The lessor was described in the lease as the Reconstruction Finance Corporation and the United States of America "both acting by and through the General Services Administrator under and pursuant to the powers and authority contained in the provisions of the Federal Property and Administrative Services Act of 1949 and the Surplus Property Act of 1944 (58 Stat. 765) as amended thereby * * *" (R. 9). By the terms of the lease the

lessee agreed to pay all taxes assessed against the property (R. 40, 41).

On October 18, 1949, the appellant, Rohr Aircraft Corporation, succeeded to the rights of the lessee. On March 17, 1955, a quitclaim deed from the Reconstruction Finance Corporation to the United States was executed with respect to the property (R. 41).

The City of Chula Vista assessed ad valorem real property taxes on the realty against the Reconstruction Finance Corporation as the owner for the fiscal tax years 1951–1952 and 1952–1953 in the total amount of $16,123.06 (R. 36–37, 42). Beginning in the tax year 1953–1954, the duties of tax assessment and collection for the City were taken over by the County of San Diego. The County of San Diego assessed ad valorem real property taxes on the realty against the Reconstruction Finance Corporation as the owner for the tax years 1951–1952, 1952–1953, 1953–1954, and 1954–1955 in the total sum of $146,730.86. Also for the tax years 1953–1954 and 1954–1955 the County, for and on behalf of the City, assessed ad valorem taxes on the realty and collected the total sum of $24,588.88 (R. 36–37). The appellant paid these taxes and filed claims for refund on the grounds that the property was owned by the United States and not the Reconstruction Finance Corporation and was therefore exempt from taxes. These claims for refund were denied and the appellant instituted suit for the recovery of the taxes it paid in the Superior Court for the County of San Diego, California (R. 1–8, 9–29). The trial court entered judgment against the plaintiff and it appealed to the District Court of

Appeals for the Fourth Appellate District of California, which decided for the appellant (Juris. St. 27–41), and the County and City appealed to the Supreme Court of California. The Supreme Court of California affirmed the judgment of the trial court, and this appeal followed.

SUMMARY OF ARGUMENT

There is involved here no question of the power of the states to tax the possessory interests of lessees of federal property. The sole question is whether the real property itself was subject to taxation by reason of a statutory waiver of immunity, in which case the appellant would be liable under the terms of its lease.

In the Reconstruction Finance Corporation Act (47 Stat. 5, 15 U.S.C. 1946 ed., Supp. II, 601 *et seq.*), Congress has granted the states the authority to tax real property owned by the Reconstruction Finance Corporation (15 U.S.C. 607). Undoubtedly this waiver by Congress was motivated by the fact that in large part such property was utilized for industrial and commercial purposes and would, in the absence of federal ownership, have been the source of state tax revenues. This reason for submission to state taxation ceased when the lease by the Reconstruction Finance Corporation was terminated, and the property repossessed and turned over to War Assets Administration as surplus. Pending disposal, the property was in fact used as a government depot for storage and as a center for disposal of government surplus property. The specific interest of the Reconstruction Finance Corporation in the use of the property ceased and the government's re-

lation to it became the same as that to any other surplus federal property held for orderly disposal. Possession and control were no longer in the Reconstruction Finance Corporation; it retained no proprietary interest. The question is whether the absence of a deed transferring title sufficed to keep the property within the scope of the waiver, even though the purpose of the waiver had ceased.

On this issue, authority is split. In agreement with the court below that the waiver remains effective so long as a deed has not been executed is the Supreme Court of Michigan in *Continental Motors Corp.* v. *Township of Muskegon*, 346 Mich. 141. The United States District Court for the Western District of Pennsylvania has gone even further, holding that the waiver remains effective even after transfer of title by the Reconstruction Finance Corporation. *United States* v. *County of Lawrence*, 173 F. Supp. 307, now pending on appeal to the Court of Appeals for the Third Circuit. On the other side is a decision by the Court of Claims which, on facts indistinguishable from those in the present case, held that the waiver ceased when possession and control was transferred. *Board of County Com'rs* v. *United States*, 105 F. Supp. 995. And the Court of Appeals for the Ninth Circuit has held that the United States, rather than the Reconstruction Finance Corporation, is the real party in interest in a suit involving property in the same posture. *United States* v. *Shofner Iron and Steel Works*, 168 F. 2d 286.

The federal law on the disposal of surplus property does not require the execution of a formal deed from

one federal agency to another. If, for the purposes of the government, a declaration that the property is surplus, actual transfer of possession and control, and the acceptance of the duties and powers ordinarily associated with ownership suffice, then, for all practical purposes, ownership has effectively passed. The property has ceased to be treated and managed as property of the Reconstruction Finance Corporation, without the need for legal formalities, such as execution of a deed or other instrument of conveyance that would be used if the transaction were between private parties but which are unnecessary and inappropriate as between agencies of the government. Under these circumstances, the waiver of immunity from state taxation should not be construed to continue in effect.

ARGUMENT

THE PROPERTY WAS NOT TAXABLE UNDER THE STATUTORY WAIVER OF IMMUNITY APPLICABLE TO PROPERTY OF THE RECONSTRUCTION FINANCE CORPORATION SINCE IT HAD BEEN DECLARED SURPLUS AND TRANSFERRED TO THE WAR ASSETS ADMINISTRATION.

The taxes here involved are ad valorem taxes imposed on the owner of the property. Any liability of the appellant is not based on its possession of the property, but on its undertaking in the lease to pay all taxes legally assessed against the property. It is not argued that property of the United States is subject to state taxation in the absence of a statutory waiver. Therefore, the sole question here is whether the waiver of federal immunity from state taxation enacted with respect to property owned by the Recon-

struction Finance Corporation was applicable to this property after it had been declared surplus and after possession and control had been transferred to the War Assets Administration.

During World War II a large amount of property was acquired by government agencies for use in prosecution of the war. After the termination of the war a substantial amount of this property was no longer needed for the purposes for which it was obtained. By Executive Order No. 9689, dated January 31, 1946, 11 Fed. Reg. 1265, promulgated under the authority of the First War Powers Act, 1941, c. 593, 55 Stat. 838 (50 U.S.C. App. 1940 ed., Supp. I. Secs. 601-605), the War Assets Administration, headed by the War Assets Administrator, was vested as of March 25, 1946, with the legal responsibility for the disposal of Government Surplus Property under the Surplus Property Act of 1944, c. 479, 58 Stat. 765.[4] Under the terms of the Surplus

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[4] In the interim between passage of the Surplus Property Act of 1944 and the creation of the War Assets Administration on March 25, 1946 a series of Government agencies were charged with responsibility for disposal of surplus Government property. The Surplus Property Act of 1944 originally created a central Government agency, the Surplus Property Board, to facilitate and regulate the orderly disposal of surplus property. This Board was vested with general supervision and direction over the handling and disposition of surplus property; however the Board did not perform the physical duties of handling and operating surplus property. Rather the Board was empowered to appoint various other Government agencies as disposal agencies which had the duty physically to take care of, and handle, surplus property. By Section [illegible] of Surplus Property Board Regulation No. 1, 10 Fed. Reg. [illegible] (1945), promulgated under the Surplus Property Act of 1944, the Surplus Property Board designated the Reconstruction Fi-

Property Act of 1944, after March 25, 1946, a government agency possessing property which had become surplus to its needs was required to so declare it and transfer it to the War Assets Administration, which effected its disposal.

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nance Corporation as the disposal agency for all capital goods, producers' goods, and industrial real property. Because the five-man Surplus Property Board proved unwieldly, Congress by the Act of September 18, 1945, c. 368, 59 Stat. 533 (50 U.S.C. App. 1940 ed., Supp. V, Secs. 1614a, 1614b) abolished the Surplus Property Board and created the Surplus Property Administration and transferred the functions of the Board to Surplus Property Administration. The Reconstruction Finance Corporation created the War Assets Corporation to carry out the disposal functions delegated to the Reconstruction Finance Corporation. The Surplus Property Administration recognized the War Assets Corporation by an Amendment to the Surplus Property Administration Regulations, dated January 5, 1946, 11 Fed. Register 408 (1946), by which Amendment the functions of the Reconstruction Finance Corporation as a disposal agency were transferred to the War Assets Corporation. Early in 1946, the Surplus Property Administration procedure was drastically changed by the President by the issuance of Executive Order No. 9689, dated January 31, 1946, 11 Fed. Reg. 1265 (1946), under the authority conferred on him by the First War Powers Act, 1941, c. 593, 55 Stat. 838 (50 U.S.C. App. 1940 ed., Supp I, Secs. 601-605), which Executive Order provided for the following: (1) Effective March 25, 1946, the War Assets Administration, headed by the War Assets Administrator, was created; (2) between January 31, 1946, and March 25, 1946, the functions of the Surplus Property Administration were transferred to the War Assets Corporation (this was solely for the practical purpose of permitting the War Assets Administration a two-month period in which to organize); and (3) effective March 25, 1946, all the interim powers of the War Assets Corporation were transferred to the War Assets Administration. The effect of this Executive Order was to take the Reconstruction Finance Corporation and the War Assets Corporation out of the Surplus Property program, to transfer all of their duties as disposal

By the declaration on May 29, 1946, the Reconstruction Finance Corporation declared that the property in question was surplus to its needs and responsibilities. This declaration of surplus vested the War Assets Administration with the responsibility for, and the duty to perform, the following functions in regard to this realty: (1) The duty to care for and to handle the property pending disposal, including the completing, converting, rehabilitating, protecting, and operating of the property (Sections 3(g) and 6 of the Surplus Property Act of 1944); (2) the right to control the terms of disposal of the property (Section 9(b) of the Act); (3) the right to donate the property if certain conditions were met (Section 13(b) of the Act); (4) the duty to dispose of the property by sale, lease, exchange, or transfer for cash, credit, or other property as deemed fit (Section 15(a) of the Act); and (5) the right to execute a deed to the property or to take any steps necessary to transfer title to this property (Section 15(b) of the Act). (Appendix, *infra*, pp. 20-22.) Further, Section 30(a) of the Surplus Property Act of 1944 provided that all funds derived from the disposition of such surplus property would be covered into the United States Treasury as miscellaneous receipts to the benefit of the United States, with the exception of several situations not relevant here. (Appendix, *infra*, p. 22.) The act contains no requirement that a deed be executed.

agencies to the War Assets Administration, and to vest in the War Assets Administration both the legal responsibility for the care, control, and disposal of surplus property and the duty to physically take custody of, care for, control, and dispose of surplus property as a disposal agency.

Since the War Assets Administration was vested with the right to operate, care for, protect, rehabilitate, complete, and convert the real property here involved, it necessarily had the right to possession of the property. The War Assets Administration did take possession of this real property on May 29, 1946, the date of the declaration of surplus, and it and its successor, the General Services Administration,[3] retained possession of this property until the lease of the property to the former Rohr Aircraft Corporation on September 1, 1949. Meanwhile the property was used as a storage depot and as a sales center for surplus property. The lease was not signed by an Officer of the Reconstruction Finance Corporation, but by the General Services Administrator acting for both the United States and the Reconstruction Finance Corporation. From the foregoing it is clear that the declaration that this real property was surplus effectively divested the Reconstruction Finance Corporation of all rights and duties with respect to the realty, and vested all rights to possess, to use, to operate, and to dispose of it in the War Assets Administration and its successor.

[3] Congress transferred, as of July 1, 1949, all of the functions of the War Assets Administration to the General Services Administration by the Federal Property and Administrative Services Act of 1949, c. 288, 63 Stat. 377 (41 U.S.C. 1946 ed., Supp. III, Secs. 201-274). The General Services Administration had similar rights and duties with respect to the involved property as did the War Assets Administration. Sections 3 (e), (g) and (h), 105, 203 (a), (b), (c), (d), and (j), and Section 204 of the Federal Property and Administrative Services Act of 1949, Appendix, *infra*, pp. 24-28.

The legal effect of a declaration of surplus by the Reconstruction Finance Corporation under the Surplus Property Act of 1944 was summarized in *United States v. Shofner Iron & Steel Works,* 168 F. 2d 286, 287 (C.A. 9), a suit brought by the United States as the real party in interest to eject a defendant from property declared surplus by the Reconstruction Finance Corporation, in the following language:

> Having declared the property surplus to its needs and responsibilities, that corporation retains no more than the barren legal title for the use of the United States to be transferred wherever the latter may direct. The responsibility and authority for disposing of the property and for its care and handling pending disposal are by the terms of the Surplus Property Act vested in War Assets Administration, an executive arm of the government, and Congress could not but have intended that the Administration take possession of property declared surplus wherever it deemed that course necessary or expedient. * * *

Similarly, in *Monolith Portland Mid. Co. v. Reconstruction F. Corp.,* 128 F. Supp. 824, 841 (S.D. Calif.) the court stated that, where the Reconstruction Finance Corporation declares property to be in excess of its needs, the Corporation transfers all beneficial ownership to the United States, and thereafter the Reconstruction Finance Corporation is a mere formal "title" holder. And in *Pergament v. Fraser,* 93 F. Supp. 9 (E.D. Mich), a federal district court dismissed a suit brought against the Reconstruction Finance Corporation concerning property declared

surplus but title to which was retained by the Reconstruction Finance Corporation, on the grounds that the real parties in interest were the United States and the War Assets Administration and that no judgment could be enforced against the Reconstruction Finance Corporation in regard to the property, citing *United States v. Shofner Iron & Steel Works*, *supra*.

The result of this transfer of possession and control from the Reconstruction Finance Corporation to the War Assets Administration on the waiver of immunity provision in the Reconstruction Finance Corporation Act is the question before the Court. The pertinent portion of Section 8 of that Act provides (15 U.S.C. 1946 ed., Supp. II, 607):

> * * * any real property of the Corporation shall be * * * subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. * * *

This provision has appeared in the Act since its original enactment in 1932. 47 Stat. 10.[4] Prior to 1940 the activities of the Reconstruction Finance Corporation were primarily financial in nature. In that

[4] None of the committee reports at that time indicated the purpose of this provision. See S. Rep. 33, H. Reps. 36 and 243, 72d Cong., 1st Sess. However, the language of the waiver was borrowed from provisions of earlier statutes dealing with federal financial institutions, specifically the Act of June 3, 1864, 13 Stat. 99, 111 (12 U.S.C. 548) authorizing the creation of national banking associations and the Federal Reserve Act of 1913, 38 Stat. 251, 258 (12 U.S.C. 531). See also the statutes establishing the Federal Land Banks, 39 Stat. 380 (12 U.S.C. 931, 933) and the National Agricultural Credit Corporation, 42 Stat. 1469 (12 U.S.C. 1261).

year Congress authorized it to organize corporations to control and operate plants for the manufacture of war materials and to purchase critical supplies. 54 Stat. 573. And in 1941, amendments to Section 10 of the Act made it clear that the waiver of exemption from state taxation for real property extended to real property acquired by its subsidiary, the Defense Plant Corporation. 55 Stat. 248. Congress was then quite conscious that the rapidly expanding defense production program would necessitate the acquisition of large amounts of land and of the effect of such acquisitions on local revenues. See 87 Cong. Rec. 4516.

Thus it appears that, in waiving immunity for the Reconstruction Finance Corporation, Congress was concerned with preserving the states' powers to tax real property held by a federal governmental agency, but acquired as a result of banking and industrial activity. When the Reconstruction Finance Corporation was forced to foreclose on private industries, Congress did not want the states to suffer a tax disadvantage. Similarly, when the Reconstruction Finance Corporation went into the business of producing machinery and munitions, the states were allowed to retain taxing authority of the real property involved in order to fulfill their municipal obligations which would be added to by the very activity which, in the absence of a waiver, would otherwise have withdrawn property from taxation. These purposes, it is clear, terminate when the property is declared surplus and turned over to another government agency for disposition. In such a situation the Reconstruction Finance Corporation no longer has any proprietary interest;

the property is no longer that "of" the former owner. The fact that the other agency had no immediate need for a formal deed transferring so-called "barren legal title" has no relevance to the fact that the property was no longer held by the Reconstruction Finance Corporation in the performance of its functions, but was held by the disposing agency in the same way as property declared surplus by any other department of the government.

Even on the assumption that "title" remained in the Reconstruction Finance Corporation, in other situations it is recognized that the holding of such bare legal title is not controlling on the scope of federal immunity. Thus in the New York case of *Merganthaler Linotype Co.* v. *Mills*, 281 App. Div. 167, it was held that property held in the name of the United States was subject to state and local taxation because the beneficial owner was actually the Reconstruction Finance Corporation, and, therefore, within the terms of the waiver. In *King County, Wash.* v. *United States Ship. Board E.F. Corp.*, 282 Fed. 950, 953-954, the Ninth Circuit said:

> The taxable character of property is to be referred to the status of the real, rather than of the nominal, owner. Private property is not exempt from taxation because the government holds the legal title thereto, and by parity of reasoning neither is public property taxable because the naked legal title is in a private person.

For similar situations in which a realty tax has been imposed against land formally held by a tax exempt body, but beneficially owned by a person subject to tax-

ation, see: *Carroll* v. *Safford*, 3 How. 441; *New Brunswick* v. *United States*, 276 U.S. 547; *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558.

In *Board of County Com'rs* v. *United States*, 105 F. Supp. 995, the precise issue here involved was presented to the Court of Claims on facts indistinguishable from those in the present case. That court held that the declaration that the property was surplus transferred its ownership to the War Assets Administration from the Reconstruction Finance Corporation, and that, accordingly, the real property was no longer subject to local taxation. In reaching this decision, the Court of Claims outlined the factual situation before it as follows (p. 1001):

> The law did not require that the RFC execute a deed of the property upon its transfer to the control of the WAA, and the RFC continued after April 16, 1947, as the "owning agency" within the meaning of the Surplus Property Act—apparently as a matter of convenience to the Government and to minimize actual paper work and expense until the WAA made final disposition of the property. While a bare legal title for the use of the United States may have thus remained in the RFC from April 16, 1947, until February 25, 1948, when the property was transferred to the Department of the Air Force, nevertheless the entire responsibility for the care and handling, and disposition of the property was in the WAA during that period. *United States* v. *Shofner Iron & Steel Works*, 9 Cir., 168 F. 2d 286, 287.

The waiver of constitutional immunity from taxes of "real property of the corporation"

enacted with respect to the RFC in 1932, 47 Stat. 10, was undoubtedly intended to apply to that real property of the corporation held by it in the performance of the duties and responsibilities imposed upon it by law. But by the August 21, 1946, declaration of the property as surplus under the Surplus Property Act, 58 Stat. 765, enacted some 12 years after 47 Stat. 10, the RFC declared that the property was surplus to its "needs and responsibilities", and by the acceptance of April 16, 1947, was divested of all control and responsibility. At no time after the acceptance by the WAA on April 16, 1947, did the RFC or any of its employees have physical possession, control, or custody of the property. It had neither the use nor the right to use the property. It could not even withdraw the declaration of surplus property without the approval of the War Assets Administrator, 32 CFR, 1946 Supp. 8301.15(b).

After considering these facts the court stated its ultimate legal conclusions in the following terms (pp. 1001–1002):

> There is no indication that Congress intended to waive immunity from taxation under these circumstances, if indeed the Kansas legislature intended to tax the RFC's interest in such a situation. Cf. *Lancy* v. *City of Boston*, 186 Mass. 128, 71 N.E. 302. Such a situation could not even have arisen at the time the waiver provision was enacted, and was made possible only by the enactment of the Surplus Property Act some 12 years later. The purpose of the waiver provision had been fully served when the property passed to the control of the WAA.

Upon consideration of these factors we cannot presume that Congress intended the waiver provision with respect to "real property of the corporation" to extend to the lands in question after they passed to the responsibility and authority of the WAA on April 16, 1947. Thus we hold that the cloak of immunity descended upon the property on that day and no tax liability for the property could arise thereafter.

Since the intent of Congress as to the extent of the waiver is the sole issue here, it is important that Congress itself has recognized that the ownership in respect to which tax immunity was waived may be terminated by the transfer of possession and control. In 1955, Congress made specific provision for payments in lieu of taxes where property is transferred from the Reconstruction Finance Corporation to some other government agency resulting in the immunization of property from local taxation. 69 Stat. 721, 40 U.S.C. 1958 ed. 521–524. In this statute Congress defined the term "transfer", which was deemed to terminate the right of the states to tax, to include "a transfer of custody and control of, or accountability for the care and handling of, any real property" as well as "a transfer of legal title to any real property." Thus in effect Congress sanctioned the construction placed on the waiver provision by the Court of Claims in *Board of County Com'rs v. United States, supra.*[8]

[8] There is a statement in the hearings on this legislation that the General Services Administration had for some period of time believed that a transfer of title from the Reconstruction Finance Corporation was necessary to make the waiver ineffective. However, the Administration had changed its position in the light of the opinion of the Court of Claims and a Comp-

The position taken by the court below is supported by an opinion of the Supreme Court of Michigan in *Continental Motors Corp.* v. *Township of Muskegon*, 346 Mich. 141. Moreover, the United States District Court for the Western District of Pennsylvania has gone even further in holding that even the transfer of title, as well as of possession and control, does not terminate the waiver of immunity once the property has been subjected to local taxation. *United States* v. *County of Lawrence, et al.*, 173 F. Supp. 307. That case is now pending on appeal in the Court of Appeals for the Third Circuit. We urge that these decisions, like that of the court below, fail to recognize that the purpose of the waiver was to permit taxation under circumstances peculiar to the functions of the Reconstruction Finance Corporation and that these circumstances are terminated when the property is declared surplus and turned over to another agency for disposition.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

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Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
MYRON C. BAUM,
JOHN J. MCCARTHY,
Attorneys.

FEBRUARY 1960.

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troller General's decision (32 Dec. Comp. Gen. 164); Hearings on H.R. 6182 before the House Committee on Government Operations, 84th Cong., 1st Sess., pp. 126–127.

APPENDIX

Surplus Property Act of 1944, c. 479, 58 Stat. 765:

SEC. 3. As used in this Act—

* * * * *

(e) The term "surplus property" means any property which has been determined to be surplus to the needs and responsibilities of the owning agency in accordance with section 11.

* * * * *

(g) The term "care and handling" includes completing, repairing, converting, rehabilitating, operating, maintaining, preserving, protecting, insuring, storing, packing, handling, and transporting, and, in the case of property which is dangerous to public health or safety, destroying, or rendering innocuous, such property.

* * * * *

(50 U.S.C. App. 1940 ed., Supp. IV, Sec. 1612.)

SEC. 6. The activities of the Board shall be coordinated with the programs of the armed forces of the United States in the interests of the war effort. Until peace is concluded the needs of the armed forces are hereby declared and shall remain paramount. The Board shall have general supervision and direction, as provided in this Act, over (1) the care and handling and disposition of surplus property, and (2) the transfer of surplus property between Government agencies.

(50 U.S.C. App. 1940 ed., Supp. IV, Sec. 1615.)

SEC. 9.

* * * * *

(b) Regulations issued pursuant to subsection (a) may, except as otherwise provided in this Act, contain provisions prescribing the extent to which, the times at which, the areas in which, the agencies by which, the prices at which, and the terms and conditions under which, surplus property may be disposed of, and the extent to which and the conditions under which surplus property shall be subject to care and handling.

* * * * *

(50 U.S.C. App. 1940 ed., Supp. IV, Sec. 1618.)

SEC. 13.

* * * * *

(b) Under regulations prescribed by the Board, whenever the Government agency authorized to dispose of any property finds that it has no commercial value or that the cost of its care and handling and disposition would exceed the estimated proceeds, the agency may donate such property to any agency or institution supported by the Federal Government or any State or local government, or to any nonprofit educational or charitable organization, or, if that is not feasible, shall destroy or otherwise dispose of such property, but, except in the case of property the immediate destruction of which is necessary or desirable either because of the nature of the property or because of the expense or difficulty of its care and handling, no property shall be destroyed until thirty days after public notice of the proposed destruction thereof has been given (and a copy of such notice given to the Board at the beginning of such thirty-day period) and an attempt has been made within such thirty days to dispose of such property otherwise than by destruction.

* * * * *

(50 U.S.C. App. 1940 ed., Supp. IV, Sec. 1622.)

SEC. 15.(a) Notwithstanding the provisions of any other law but subject to the provisions of this Act, whenever any Government agency is authorized to dispose of property under this Act, then the agency may dispose of such property by sale, exchange, lease, or transfer, for cash, credit or other property, with or without warranty, and upon such other terms and conditions, as the agency deems proper: *Provided, however,* That in the case of raw materials, consumer goods, and small tools, hardware, and nonassembled articles which may be used in the manufacture of more than one type of product, no extension of credit under this Act shall be for a longer period than three years.

(b) Any owning agency or disposal agency may execute such documents for the transfer of title or other interest in property or take such other action as it deems necessary or proper to transfer or dispose of property or otherwise to carry out the provisions of this Act, and, in the case of surplus property, shall do so to the extent required by the regulations of the Board. (50 U.S.C. App. 1940 ed., Supp. IV, Sec. 1624.)

SEC. 30.(a) All proceeds from any transfer or disposition of property under this Act shall be covered into the Treasury as miscellaneous receipts, except as provided in subsections (b), (c), and (d) of this section.

* * * * *

(50 U.S.C. App. 1940 ed., Supp. IV, Sec. 1639.)

Reconstruction Finance Corporation Act, 47 Stat. 5:

SEC. 8 [as amended by Sec. 1, Act of June 30, 1947, c. 166, 61 Stat. 202, and Sec. 5, Act of May 25, 1948, c. 334, 62 Stat. 265]. The Corporation, including its franchise, capital, reserves and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State,

county, municipality, or local taxing authority, except that any real property of the Corporation shall be subject to special assessments for local improvements and shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The exemptions provided for in the preceding sentence with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with respect to the Corporation but also with respect to any other public corporation which is now or which may be hereafter wholly financed and wholly managed by the Corporation. Such exemptions shall also be construed to be applicable to loans made, and personal property owned by the Corporation or such other corporations, but such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes. Notwithstanding any other provision of law or any privilege or consent to tax expressly or impliedly granted thereby, the shares of preferred stock of national banking associations, and the shares of preferred stock, capital notes, and debentures of State banks and trust companies, acquired prior to July 1, 1947, by the Corporation, and the dividends or interest derived therefrom by the Corporation, shall not, so long as the Corporation shall continue to own the same, be subject to any taxation by the United States, by any Territory, dependency or possession thereof, or the District of Columbia, or by any State, county, municipality, or local taxing authority, whether now, heretofore, or hereafter imposed, levied, or assessed, and whether for a past, present, or future taxing period.

(15 U.S.C. 1946 ed., Supp. II, 607.)

Federal Property and Administrative Services Act of 1949, c. 288, 63 Stat. 377:

SEC. 3. As used in this Act—

* * * * *

(e) The term "excess property" means any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof.

* * * * *

(g) The term "surplus property" means any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies as determined by the Administrator.

(h) The term "care and handling" includes completing, repairing, converting, rehabilitating, operating, preserving, protecting, insuring, packing, storing, handling, conserving, and transporting excess and surplus property, and, in the case of property which is dangerous to public health or safety, destroying or rendering innocuous such property.

* * * * *

(41 U.S.C. 1946 ed., Supp. III, Sec. 202.)

SEC. 105. The functions, records, property, personnel, obligations, and commitments of the War Assets Administration are hereby transferred to the General Services Administration. The functions of the War Assets Administrator are hereby transferred to the Administrator of General Services. The War Assets Administration, the Office of the War Assets Administrator, and the office of Associate War Assets Administrator are hereby abolished. Personnel now holding appointments granted under the second sentence of section 5(b) of the Surplus Property Act of 1944, as amended, may be continued in such positions or may be appointed

to similar positions for such time as the Administrator may determine.

(41 U.S.C. 1946 ed., Supp. III, Sec. 215.)

SEC. 203. (a) Except as otherwise provided in this section, the Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act.

(b) The care and handling of surplus property, pending its disposition, and the disposal of surplus property, may be performed by the General Services Administration or, when so determined by the Administrator, by the executive agency in possession thereof or by any other executive agency consenting thereto.

(c) Any executive agency designated or authorized by the Administrator to dispose of surplus property may do so by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or other interest in property and take such other action as it deems necessary or proper to dispose of such property under the provisions of this title.

(d) A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under this title shall be conclusive evidence of compliance with the provisions of this title insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

* * * * *

(j)(1) Under such regulations as he may prescribe, the Administrator is authorized in

his discretion to donate for educational purposes in the States, Territories, and possessions without cost (except for costs of care and handling) such equipment, materials, books, or other supplies under the control of any executive agency as shall have been determined to be surplus property and which shall have been determined under paragraph 2 or paragraph 3 of this subsection to be usable and necessary for educational purposes.

(2) Determination whether such surplus property (except surplus property donated in conformity with paragraph 3 of this subsection) is usable and necessary for educational purposes shall be made by the Federal Security Administrator, who shall allocate such property on the basis of needs and utilization for transfer by the Administrator of General Services to tax-supported school systems, schools, colleges, and universities, and to other nonprofit schools, colleges, and universities which have been held exempt from taxation under section 101(6) of the Internal Revenue Code, or to State departments of education for distribution to such tax-supported and nonprofit school systems, schools, colleges, and universities; except that in any State where another agency is designated by State law for such purpose such transfer shall be made to said agency for such distribution within the State.

* * * * *

(41 U.S.C. 1946 ed., Supp. III, Sec. 233.)

SEC. 204. (a) All proceeds under this title from any transfer of excess property to a Federal agency for its use, or from any sale, lease, or other disposition of surplus property, shall be covered into the Treasury as miscellaneous receipts, except as provided in subsections (b), (c), (d), and (e) of this section.

* * * * *

(41 U.S.C. 1946 ed., Supp. III, Sec. 234.)

U.S. GOVERNMENT PRINTING OFFICE, 1950

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 295

ROHR AIRCRAFT CORPORATION, a California Corporation,

Appellant,

vs.

COUNTY OF SAN DIEGO, a Body Corporate, and CITY OF CHULA VISTA, a Municipal Corporation,

Appellees.

BRIEF OF APPELLEES

I

QUESTIONS PRESENTED

(a) Has the court jurisdiction under 28 U.S.C. Section 1257(2) where it is not shown where any repugnancy of state statute to Federal law has been brought into question?

(b) Where Congress has expressly consented that real property of a Federal corporation shall be taxable, is such consent impliedly withdrawn by a designation of such property as surplus and an acceptance of administrative control by another Federal agency, under the Surplus Property Act of 1944 (Act of October

3, 1944, 58 Stat. c. 479) but, ownership is not publicly evidenced by recording of a deed?

(c) Was it the intent of Congress as shown by its legislative hearings, to preserve taxability of real property owned by Reconstruction Finance Corporation until such real property is transferred of record?

II

STATEMENT OF THE CASE

Inaccuracy in Appellants Statement

Appellant states at page 7 in his Statement of the Case:

> "War Assets Administration accepted possession and control of the property, pursuant to the declaration of RFC and the provisions of the Surplus Property Act. The plant so declared surplus by RFC was used by the War Assets Administration as a depot for the warehousing, sale, and disposition of various types of surplus war material (R. 45-48). The possession and control of War Assets Administration continued through the period for which the taxes complained of were levied and assessed."

The last statement is not supported by references to the record, and in refutation the following may be noted:

1. Continued possession by War Assets after execution of the lease to appellant Rohr on September 1, 1949 is not shown by the facts stated in the opinion of the California Supreme Court (R 109, 110).

2. Continued possession by War Assets after the execution of the lease to Rohr on September 1, 1949 is not shown by the findings of fact of the trial court (R. 40-43).

3. The lease dated September 1, 1949 (R. 9-22) transferred possession of the entire premises to appellant Rohr which is inconsistent with the claim of the continued possession by War Assets.

4. The lease (R. 9) is by its terms from RFC to Rohr, although executed at the end (R. 22) by both RFC and United States of America.

5. The lease by its terms requires Rohr to pay all taxes lawfully imposed (R. 19).

6. War Assets was a surplus disposal agency and the lease indicates a determination to retain and lease and not to dispose of the property as surplus.

These factors all argue against the claim of continued possession in War Assets after the negotiation and execution of the lease on September 1, 1949 and indicate that RFC continued as owner and lessor.

III

ARGUMENT

Summary of Argument

A. Jurisdiction

Jurisdiction is not established under 28 U.S.C. 1257(2) in that it has not been shown where any California statute has been drawn into question as to its repugnancy with any Federal Constitutional provision, statute or treaty. What the California courts did was to ascertain the intent of Congress in enacting the provisions of the Reconstruction Finance Corporation Act consenting to taxes on its real property (15 U.S.C. 607) and whether such

consent was impliedly repealed by the Surplus Property Act of 1944; 58 Stat. c. 479.

B. Congressional Intent.

Congress intended that the real property standing in the name of Reconstruction Finance Corporation should be taxable. Among the indicia of such intent are: (1) the testimony before Congress (32 Decs. Comp. Gen. 164, 166; Hearings on Amendment to the Federal Property and Administrative Services Act of 1949, as amended, Before the House Committee on Government Operations, 84th Congress, 1st Sess. 126).

(2) The 1948 amendment to the tax consent provisions of the Reconstruction Finance Corporation Act, 15 U.S.C. 607, whereby such consent, instead of being curtailed or restricted, was expanded to cover assessments as well as ad valorem taxes.

(3) The express language of the Surplus Property Act of 1944 (58 Stat. 765) when Congress declared a purpose "to avoid dislocations of the domestic economy" and "to prevent . . . unusual and excessive profits to be made out of surplus property."

(4) Congress contemplated transfer of surplus property either to governmental or charitable agencies, or to private business (50 U.S.C. App. secs. 1622, 1624). As stated by the court below it cannot be held that Congress intended that such property be immune from taxation during the disposal process.

(5) The cases are apparently unanimous in asserting taxability as to property used for proprietary business purposes. The Sedgwick case, *Board of County Commissioners* v. *United States*, 105 F. Supp. 995, may be distinguished in that there the property was used governmentally by the Air Force.

A. JURISDICTION

1. JURISDICTION OF THIS COURT IS NOT ~~CONCERNED~~ CONFERRED BY SUBDIVISION (2) OF TITLE 28, U.S.C. SECTION 1257.

Appellant in its brief states that jurisdiction is conferred upon the court by Subdivision (2) of Title 28, USC, Section 1257. In the brief of the United States as Amicus Curiae the United States "do[es] not discuss this question of jurisdiction since it seems more appropriate for the appellant to support his choice of procedures."

There is no showing by appellant that any named and identified statute of the State of California was drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States. It is not shown nor was it the fact that any California statute was quoted, referred to, discussed or otherwise drawn into question in the decision of the California Supreme Court (R., pages 109-114), in the decision of the District Court of Appeal (Brief of Appellant, Appendix B, xvii through xxxi), in the decision of the Superior Court (Appellant's Statement as to Jurisdiction, Appendix C, pages 42 through 46), or in the appellant's complaint filed in the Superior Court (R., pages 1-7).

Rule 16, Subsection 4, provides in its final sentence:

> . . . If consideration of the question of jurisdiction is postponed, counsel should address themselves, at the outset of their briefs and oral argument, to the question of jurisdiction.

While the brief of appellant does have a brief statement at pages 2 and 3 purporting to support grounds for jurisdiction, the attempt to support jurisdiction under Title 28, Section 1257, Sub-

division (2) is fatally defective as shown by the following decisions of this Honorable Court:

Citizens National Bank v. Durr, 257 U.S. 99
Mergenthaler Linotype Co. v. Davis, 251 U.S. 256
Jett Brothers Distilling Co. v. Carrollton, 252 U.S. 1
U.S. Ship. Bd. Emer. Fleet Corp. v. Sullivan, 261 U.S. 146
Dana v. Dana, 250 U.S. 220
Memphis Natural Gas Co. v. Beeler, 315 U.S. 649
Ex parte Williams, 277 U.S. 267
New Orleans Land Co. v. Brott, 263 U.S. 97
Charleston Fed. Sav. & Loan Assn. v. Alderson, 324 U.S. 182
Hanson v. Denckla, 357 U.S. 235
Raley v. Ohio, 360 U.S. 423
Wilson v. Cook, 327 U.S. 474.

In *Citizens Nat. Bank* v. *Durr*, 257 U.S. 99, Justice Pitney said at 106:

> . . . Until the decision of the latter court the Federal right had been asserted merely as a claim of immunity from the tax under the constitutional provisions referred to, without drawing in question the validity of any statute of, or authority exercised under, the state, on the ground of their being repugnant to those provisions. After the final decision, in an application to the supreme court for a rehearing, plaintiff for the first time asserted that the decision, if adhered to, rendered the Ohio taxation statutes invalid because of such repugnance. This application was denied without reasons given, and hence must be regarded as having come too late to raise any question for review by this court.

In *Mergenthaler Linotype Co.* v. *Davis*, 251 U.S. 256, the court said at 259:

> The claim that the lease contractwas made in course of interstate commerce, and therefore not subject to state statutes, was insufficient to challenge the validity of the

latter; at most it but asserted a "title, right, privilege, or immunity" under Federal Constitution which might afford basis for certiorari, but constitutes no ground for writ of error from this court.

In *Jett Brothers Distilling Co.* v. *Carrollton*, 252 U.S. 1 at 5 it is stated:

> . . . Neither the answer nor the opinion of the court of appeals shows that any claim under the Federal Constitution was made, assailing the validity of a statute of the state, or of an authority exercised under the state, on the ground of repugnancy to the Federal Constitution.
>
> * * * *
>
> In order to give this court jurisdiction by writ of error under amended § 237, Judicial Code, it is the validity of the statute or authority which must be drawn in question. The mere objection to an exercise of authority under a statute whose validity is not attacked cannot be made the basis of a writ of error from this court. There must be a substantial challenge of the validity of the statute or authority, upon a claim that it is repugnant to the Federal Constitution, treaties, or laws, so as to require the state court to decide the question of validity in disposing of the contention.

In *U.S. Ship B. Emer. Fleet Corp.* v. *Sullivan*, 261 U.S. 146 at 148 the court held:

> The writ of error must be dismissed. The record fails affirmatively to disclose that there was drawn in question the validity of a treaty or statute. . . . Considering the whole record it is clear that there was no controversy over the validity of any treaty, statute or authority . . .

In *Dana* v. *Dana*, 250 U.S. 220 at 222 it said:

> . . . Since the passage of the amendment, cases brought within its effect, of the character of this one, cannot be brought here by writ of error unless there is drawn in ques-

tion the validity of a statute of or an authority exercised under the state on the ground of their being repugnant to the Federal Constitution, treaties, or laws. Other cases of alleged denial of Federal rights, as specified in the statute, can be reviewed in this court only upon writ of certiorari.

In *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, Chief Justice Stone said at 650:

> . . . But appellant's bill of complaint, filed in the chancery court, alleged only that the assessment of the tax and the threatened levy violated its rights under the commerce clause. Our decisions have long since established that an attack upon a tax assessment or levy, on the ground that it infringes a taxpayer's federal rights, privileges or immunities, will not sustain an appeal under § 237 (a) . . . It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal. The Judicial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled.

In *Ex parte Williams*, 277 U.S. 267, at 272 Justice Brandeis stated:

> . . . But a judgment of a state sustaining a tax alleged to be illegal because there has been discrimination in assessing property, can be reviewed only on certiorari.

In *New Orleans Land Co.* v. *Brott*, 263 U.S. 97 at 100 Justice Holmes concludes:

> . . . The supreme court of the state may have unduly limited the Act of Congress of March 2, 1805, but did not dispute its binding effect.

In *Charleston Fed. Sav. & Loan Asso.* v. *Alderson*, 324 U.S.

182 at 185, Chief Justice Stone stated:

> . . . And it has long been settled that an attack upon a tax assessment or levy, such as appellants here made, on the ground that it infringes a taxpayer's Federal rights, privileges, or immunities, will not sustain an appeal under § 237 (a).
>
> * * * *
>
> . . . But it does not appear from the opinion of the Supreme Court of Appeals that the Federal question was presented to or considered by that court. While the opinion intimates that appellants' objection was made to the administration of the statute, it nowhere indicates that they contended that, as applied, the statute was invalid as repugnant to the Federal Constitution.
>
> * * * *
>
> . . . Even where the Federal question has been properly raised below, an appeal under § 237 (a) may be dismissed where appellants fail to attack a statute explicitly in their assignments of error here.

In *Hanson* v. *Denckla*, 357 U.S. 235 at 244, Chief Justice Warren held:

> The question of our jurisdiction was postponed until the hearing of the merits. The appeal is predicated upon the contention that as applied to the facts of this case the Florida statute providing for constructive service is contrary to the Federal Constitution. 28 USC § 1257 (2). But in the state court appellants (the 'beneficiaries') did not object that the statute was invalid as applied, but rather that the effect of the state court's exercise of jurisdiction in the circumstances of this case deprived them of a right under the Federal Constitution. Accordingly, we are without jurisdiction of the appeal and it must be dismissed.

In *Raley* v. *Ohio*, 360 U.S. 423 at 435, Justice Brennan said:

> . . . "It is essential to our jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts

> that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." . . . Despite the import of our order postponing the consideration of jurisdiction till the hearing on the merits, see Rule 16 (4) of this Court, appellants have made no effort to support their burden of demonstrating an attack made by them on the validity of a state statute in the state courts, and we have found none. Accordingly, the appeals are dismissed.

In *Wilson* v. *Cook*, 327 U.S. 474 at 480, it is said by Chief Justice Stone:

> . . . This jurisdictional requirement is satisfied only if the record shows that the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state . . . or has in fact been decided by it . . . and that its decision was necessary to the judgment. . . . The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground . . . The court considered only the validity of 'the tax,' not that of the statute.

It therefore appears conclusively that failure of appellant to show where and how the validity of any state statute was drawn into question as being repugnant to the Constitution, treaties or laws of the United States or that the California court held that any such statute was valid against such claim of repugnance to the Constitution, treaties or laws of the United States, is fatal to the jurisdiction of this court as to the attempted appeal under Subdivision (2), Title 28, U.S.C. Section 1257.

B. CONGRESS GAVE EXPRESS CONSENT TO LEVY PROPERTY TAXES ON FEDERAL PROPERTY UNDER THE FACTS IN THIS CASE AND INTENDED THAT THIS AUTHORITY SHOULD CONTINUE SO LONG

AS LEGAL TITLE REMAINED IN THE RECONSTRUCTION FINANCE CORPORATION.

As his heading B, appellant states the following: "Local Property Taxes Levied Directly Upon Property of the United States Are Invalid in the Absence of Express Congressional Consent." (App. Brief p. 23). Appellees have no quarrel with this statement, but the fact is, as will be shown below, Congress gave express consent and direction that State and local taxes were to be assessed and paid and intended that this authority should continue. The real question is was the express consent vacated or taken away. Appellees contend that this right was not only not taken away but that by its actions Congress clearly intended that it should be continued.

In an effort to minimize the reasoning and authoritativeness of the respective opinions of the Supreme Courts of Michigan (*Continental Motors Corp.* v. *Township of Muskegon*, 346 Mich. 141, 77 N.W. 2d 370) and California (*Rohr Aircraft Corp.* v. *County of San Diego and City of Chula Vista*, 51 Cal. 2d 759, 336 P. 2d 521), appellant has impugned the integrity of the Supreme Courts of these states. At page 22 of its brief, appellant states:

> The decision of the California Court is but typical of that which can be expected from other state courts that might have occasion to consider similar problems. Competition for sources of revenue as between the federal, state, and local governments is such that each is seeking to advance its own self-interest . . .

Further on he states:

> Thus is the competition for revenues supporting local governmental budgets typified. At every opportunity, local

courts can be expected to construe state and local statutes in a manner which adds to local revenues . . .

While such an argument does not go to the merits of the case, appellees cannot allow these statements to go unnoticed. It is unbelievable that this Honorable Court does not give the opinions of the Supreme Courts of the states of this nation the weight, respect and integrity to which they are justly entitled. Is the Supreme Court of the State of California, a court of last resort, to be given less authoritativeness, respect and weight than the District Court of Appeal which held in favor of appellant? If appellants argument is valid then it could be equally urged that it would be an idle act on the part of appellees to appear in this Honored Court. To this of course appellees cannot in any way subscribe. It would appear that appellant is "hoist with his own petard" (Shakespeare, Hamlet, iii, 4, 206) by such an attack.*

Be that as it may, it is ironic to find that the United States in its amicus brief at page 18 in a footnote states: "There is a statement in the hearings of this legislation (referring to the provision in 69 Stat. 721, 40 U.S.C. 521-524, where Congress made specific provision for payment of taxes where property is transferred from the RFC to some other government agency, resulting in the immunization of property from local taxation) (parenthesis our material) that the General Services Administration had for

*For an example of lack of self interest, see a 1959 decision of the Supreme Court of California which resulted in millions of dollars of refunds in possessory interest taxes to the Federal Government through its prime and subcontractors. General Dynamics Corporation v. Los Angeles, United States of America, Intervenor; and Aerojet-General Corporation v. County of Los Angeles, United States of America, Intervenor, 51 Cal. 2d 59, 330 P. 2d 794.

some period of time believed that a transfer of title from the RFC was necessary to make the waiver ineffective." Appendix B. The waiver being in reality the express consent of Congress to tax. (For the text of the letter referred to, see Appendix B). It was only after the decision of the Court of Claims in the Sedgwick County case and in a Controller General's decision (32 Dec. Comp. Gen. 164) that the General Services Administration changed its mind as to the need for transfer of title. The administrative practice of the Federal administrative agency itself is entitled to great weight in the determination of the intent of Congressionally delegated authority, nor can it be lightly regarded when it has been so interpreted over some period of time. Referring to administrative practice, this Honorable Court said in the Norwegian Nitrogen Products case at page 315 U.S. cited below: "The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." (*Norwegian Nitrogen Products Co.* v. *U.S.*, 288 U.S. 294; *U. S.* v. *Bank of North Carolina*, 31 U.S. 29, 39-40). As the late Justice Cardozo said prior to his reaching this Honorable Court: "Not lightly vacated is the verdict of quiescent years" (*Coler* v. *Corn Exchange Bank*, 250 N.Y. 136, 141, 164 N.E. 882, 884, 65 A.L.R. 879). Here we have ~~an~~ AN administrative interpretation over some period of time which is in accord with the decisions of the Supreme Courts of the States of Michigan and California.

The real question, however, is what was the intent of Congress? It granted the express consent to tax. In 1948 it enlarged the consent to tax on the part of local tax authorities to include special assessments for local improvements (May 25, 1948, c.

3345, 62 Stat. 265) and then, after the decision of the court of claims, in the Sedgwick County case in July 1952 and the Comptroller General's decision in October 1952, the Congress enacted amendments to the act at the earliest opportunity which provided for so-called in lieu payments which in fact are nothing more nor less than an express Congressional grant to tax to the state and local taxing authorities because it is provided in Section 703 ". . . the governmental department . . . shall pay to the appropriate State and local taxing authorities an amount equal to the amount of the real property tax which would be payable to each such State or local taxing authority on such date if legal title to such real property had been held by a private citizen on such date and during all periods to which such date relates."

Does this indicate in any way an intent on the part of Congress to abandon or impliedly repeal the express grant of authority it had previously given to the states and local taxing authorities on property held by RFC? This Honorable Court is to determine what was the intent of Congress, and not what the administrative intent was. Here the administrative agency to whom the authority to administer the act was given correctly interpreted the intent of Congress until it felt bound by the opinions of the Court of Claims and the Comptroller General who apparently determined to give little weight to this view and thus ignore what we believe to be the true intent of Congress. In this respect it is particularly cogent to quote from the opinion of the Comptroller General the views of the Secretary of the Interior's office as to the reasons why title was not passed. At page 166 of 32 Comp. Gen. 164 it is stated:

> It was not apparent from the information available here on receipt of the Assistant Secretary's letter of February

15, why steps had not been taken to transfer the record title to this plant from the Defense Plant Corporation to the Reconstruction Finance Corporation, and thence to the General Services Administration so that the State and county records would show ownership thereof in the name of the United States instead of a Government-owned corporation. Accordingly, by Office letter dated April 1, 1952, B-108135, the views of the Administrator of General Services were requested with respect thereto. In his reply, the Administrator expressed the opinion that the barren legal title to property declared excess by the Reconstruction Finance Corporation remains in that Corporation, citing *United States* v. *Shofner Iron & Steel Works*, 168 F. 2d 286, and stated that the State and local taxing authorities hold barren legal title and record title are one and the same for tax purposes and that local laws provide for assessment of property in the name of the record owner. He stated further that, while there appears no legal impediment to transferring title from the Corporation to the United States in such cases, the policy of the General Services Administration and that of its predecessor, the War Assets Administration, has been to leave the record titles to such property in the name of the Corporation until sold or assigned for use by an agency of the Government. It is stated that this policy was initiated because some 1500 plants otherwise would have been taken off the State rolls immediately and, also, in order that effect might be given to the statutory authority to pay sums in lieu of taxes on property declared surplus under the provisions of the Surplus Property Act of 1944, 58 Stat. 765. However, it was reported that the General Services Administration obtained a quitclaim deed to the property involved, which was recorded in Albany County, Wyoming on April 8, 1952.

In the presentation of the 1955 amendment to the act which was presented to Congress at the direction of the Committee on Government Operations, we find Senator Meader stating (Vol. 101, No. 129, Cong. Rec. page 10398:

Mr. MEADER. Mr. Speaker, this bill will correct an

inequity, enhance the vitality and financial stability of local governments and contribute materially to the betterment of relations between the Federal Government and State governments and their subdivisions. It provides payments in lieu of taxes on certain Federal industrial properties to local units of government.

* * *

Mr. Speaker, when the Congress provided for the financing of these plants through the Reconstruction Finance Corporation and its subsidiaries, it properly and wisely provided that local real-estate taxes should be paid on these plants the same as if they were privately owned. Thus, federally owned property contributed its fair share of the cost of services provided by local units of government.

* * *

The abrupt cessation of these Federal tax payments, which were stopped without warning in 1952, caused these local units of government, whose budgets had already been set and taxes assessed, undue hardship requiring them to perform 100 percent of the local services on only 90 percent of the revenue. In subsequent years, of course the share which the Federal Government had been contributing was thrown upon the remaining taxpayers who were thus forced to pay more than their rightful share of the cost of local services. The Government-owned aluminum plant, however, continued to enjoy services such as police and fire protection, sewage, water, street repairs, and educational facilities.

On page 10409 we find equally strong arguments by Senator MacDonald in favor of the bill to grant the state and local governments tax moneys that were taken from them by the opinions of the Comptroller General and the Court of Claims which were diametrically opposed to the apparent intent of the Congress.

The Supreme Courts of California and of Michigan considered this question thoroughly and decided the property was taxable as Mr. Justice Spence of the California Supreme Court so ably stated at page 763 of 51 Cal. 2d 759 (336 P. 2d 521):

In *Continental Motors Corp. v. Township of Muskegon*, 346 Mich. 141 [77 N.W. 2d 370], the Supreme Court of Michigan rejected the reasoning of the Sedgwick case and came to an opposite conclusion on similar facts. The court declared that the congressional waiver of immunity "was intended to prevent prejudice to local economic conditions" and that the reason for the waiver persisted during the disposal process where the use of the property remained unchanged. (Id. at 149-150.) We are in accord with the result reached by the Supreme Court of Michigan in the cited case.

In providing for taxation of "real property of the" RFC, Congress must have intended to insure that RFC ownership of property would not withdraw important revenue sources from the local tax rolls. By enacting the Surplus Property Act of 1944 (58 Stat. 765), Congress expressed its desire to maintain competition, "to avoid dislocations of the domestic economy," and "to prevent . . . unusual and excessive profits being made out of surplus property." (58 Stat. 766.) These objectives are inconsistent with the asserted intent that RFC surplus property should be immune from taxation during the disposal process. While some of that property was ultimately to be transferred to tax-exempt entities such as federal agencies, local and state governments, and charitable organizations (58 Stat. 770-772), it was also anticipated that much of it would be returned to private hands. (58 Stat. 773-779.) Since RFC property was taxable at all times before it became surplus to the needs of the RFC, and since much of that property was destined to be sold to private persons and thereafter to be subject to local taxes, it cannot be held that Congress intended such property to be immune from taxation during the disposal process. Moreover, it appears that the disposal agencies, acting under similar reasoning, left legal title in the RFC not merely as a "matter of convenience," as the Court of Claims assumed, but for the sole purpose of continuing the tax immunity waiver until final disposition of the property. (See 32 Decs. Comp. Gen. 164, 166; Hearings on Amendment to the Federal Property and Administrative Services Act of 1949, as Amended, Before the House Committee on Government Operations, 84th Cong., 1st Sess. 126.) We conclude that the property did not become immune

from local taxes until legal title was transferred to the United States in 1955, and that plaintiff is therefore not entitled to a refund of the amounts paid. (Cal. Const., art. XIII, Sec. 1; see *Boeing Aircraft Co.* v. *Reconstruction Finance Corp.*, *supra*, 25 Wn. 2d 652, 663 [171 P. 2d 838, 845, 168 A.L.R. 539], appeal dismissed and cert. denied, 330 U.S. 803 [67 S. Ct. 972, 91 L. Ed. 1262.])

The original views of the administrative agency and the holdings of the Supreme Courts of Michigan and California are further bolstered by recent decisions of the United States District Court for the Western District of Pennsylvania. They are *U.S.* v. *Hanlon*, 165 F. Supp.1, decided April 17, 1949, and *U.S.* v. *County of Lawrence*, 173 F. Supp. 307, decided November 19, 1956. The latter case is stated by the United States in its brief as amicus curiae (p. 6) to be pending on appeal in the Court of Appeal for the Third Circuit.

Both cases appear to arise out of the same transaction and to go beyond the decision of the California court in that they hold that even though the RFC has deeded the property of record to the United States, it remains taxable when the following appears:

a. The use of the property is proprietary, consisting of manufacturing by a private corporation;

b. The Government has compelled its lessee to assume payment of the tax by affirmative agreement in its lease.

Under such circumstances the two decisions hold that the Government in seeking cancellation of the tax does not come into equity with clean hands, has estopped itself from questioning the tax, and is barred from relief by elementary principles of justice and fair play.

The court distinguishes the Sedgwick County case, *Board of*

County Commissioners v. *U.S.*, 105 F. Supp. 995, primarily on the ground that there the beneficial use of the property was for a governmental purpose, and was in fact in the custody of the Air Force.

As has been pointed out in the brief of the United States, the two Pennsylvania district court decisions involve certain issues not directly applicable in the present case. They contain, however, valuable comments on the intent of Congress not to deprive local government of its tax sustenance and of the inequity of attempted intervention by the Department of Justice in behalf of lessees as against state and local governments.

Three facts of major interest are:

1. The lease of the property assessed to Rohr Aircraft was executed on September 1, 1949 by Reconstruction Finance Corporation, not by War Assets Administration (R. 9, et seq.). Appellant states that the possession and control of War Assets Administration continued through the period for which taxes complained of by appellant were levied and assessed. However, the fact is that under the lease Rohr leased the entire (underlining ours) property (R. 58; Plaintiff's Exhibit 1; R. 36, -31) and occupied the property under this lease during each of the years for which the taxes complained of were levied (R. 58; Plaintiff's Exhibit 1; R. 36 -31, App. B, p. 7-8). These facts definitely contravene any theory of control on the part of War Assets Administration. The entire control was in the hands of the lessee to use the property as it saw fit subject only to various restrictions in the lease including cancellation by R.F.C. not War Assets Administration.

2. The lease provided for payment of taxes by Rohr Aircraft (R. 19), and as a matter of fact, under the same Clause 13 of the lease, if appellant failed to pay taxes when due, Reconstruction

Finance Corporation could at its option pay such taxes and require lessee to immediately reimburse it for such cost, the amount being immediately due and payable and to be considered as additional rental. Thus taxes were considered in the setting of the rent.

3. Appellant was operating in a purely proprietary capacity (R. 65). Clearly, here we have a situation where under the lease appellant is required to pay taxes for doing business and making private profits for the corporation as distinguished from Sedgwick County where the Air Force took possession as a purely Governmental operation. A windfall to private interests was one of the exact evils Congress was attempting to prevent by its legislation.

Appellant asks "What consequences flowed from the Declaration made by R.F.C. that the property was surplus to its needs and responsibilities?" (App. Br. p. 30). He then states that War Assets assumed through its employees full use of the property. Not so. The property was held and used under a leasehold by appellant. All that War Assets Administration was doing was in effect to act as custodian while it was determined what should be done with the property in the same fashion as a real estate property manager. Surplus Property Act of 1944 (Act of October 3, 1944, 58 Stat. c. 479). R.F.C. was still the "owning agency" (Sec. 3(b) App. Br. Appendix p. IX) and could have at any time requested withdrawal of its declaration of surplus. (Sec. 401.7 App. Br. Appendix pp. XIII-XIV). It would appear obvious in all fairness that Congress intended that taxability should remain in R.F.C. Otherwise we could end up in utter confusion on the part of the taxing agencies as to whether they had the right to tax, the administrative agencies being able to declare, undeclare and declare as surplus, without notice or other indicia of intent indi-

cated by them to the taxing agencies.

The attention of this Honorable Court is invited to the fact that the Reconstruction Finance Corporation Act in which Congress directly authorized a state and local tax on the real property of the Reconstruction Finance Corporation is not a war-time statute. It was passed in 1932. The evidence sustains the fact that during the period in which tax is claimed, appellant was in the possession and control under lease of this property from Reconstruction Finance Corporation and during all this time it was required to pay taxes to the state and local authorities. The Government by its lease shows that it did not intend to seek tax immunity but instead directed and subjected the property to local taxation to be paid by Rohr Aircraft Corporation by the explicit terms of the lease.

We do not contend that the State of California can tax Federal property without Federal authority, but we do contend that all of the facts and all of the evidence clearly shows that Congress did not intend to deprive the state and local taxing authorities of the right to tax where it had granted that right and did not specifically take it away. The arguments on presentation of the bill and the reasoning of the administrator determining that transfer of title was necessary are replete with statements that the Congress at no time intended that a windfall would be given to private corporations by placing them in a position where they were free of tax.

There is another cogent fact and that is, the Surplus Property Act is silent on the question of revocation of the right to tax. The only basis upon which you could have a repeal of this right would be by way of implication. The law does not favor repeals by implication and this general principle of law surrounded by the facts

which show the intent of Congress would clearly dispel the theory that the local taxing authorities in this case are not properly entitled to the tax.

Appellees cannot refrain from pointing out that insofar as the arguments of appellant and the Government are concerned an attempt is made to overthrow the time-honored interpretations of what is and what is not legal title and how such title is transferred. Appellant urges that title was passed by a declaration of surplus, which we believe is wishful thinking, in that it attempts to destroy tax revenue of state and local governments Congress did not intend to destroy. Local taxing authorities determine who is to be assessed by the owner of record. The owner of record was Reconstruction Finance Corporation. Had the Government wished to escape tax, it merely had to record a transfer of title from Reconstruction Finance Corporation to War Assets Administration. A simple enough thing to ask to have done in all fairness and equity to local taxing authorities. This it did not do. It is axiomatic that fair and equitable treatment should be given to the state and local governments, particularly in tax matters which so critically affect the operation of these governments. Particularly apropos here is the statement in the case of *La Societa Francaise De Bienfaisance Mutuelle v. California Employment Commission*, 56 Cal. App. 2d 534, at 554, 133 P. 2d 47, 57, where the Court quoted from an article by Maguire and Zimel, Hobson's Choice in Federal Taxation, (1935) 48 Harv. L. Rev. 1281:

> "If we say with Mr. Justice Holmes, 'Men must turn square corners when they deal with the Government,' it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens." (P. 1299.)

The County of San Diego and the City of Chula Vista are merely the representatives of the citizenry of those areas and as such should be accorded at least the usual simple formalities of transactions between the Federal Government and the states and local authorities. They are entitled not to be told that in order to save paper work, the Federal Government will not comply with time honored title transfers or give notice of who owns property which has been specifically placed on the tax rolls by Congressional direction.

1. OTHER AUTHORITIES CITED BY APPELLANT DISTINGUISHED

Appellant in his brief relies primarily, in addition to the Sedgwick County case, upon the following:

United States v. Shofner Iron and Steel Works, 168 F. 2d 286; (Appellant's Brief, 37, 44).

Reconstruction Finance Corporation v. Beaver County, 328 U.S. 204; (Appellant's Brief, 19).

People ex rel Mergenthaler Linotype Co. v. Mills, 118 N.Y.S. 2d 444, 281 App. Div. 167; (Appellant's Brief, 43).

In the Shofner case, as pointed out by the Michigan Supreme Court at 346 Mich. 153, no question of taxation was involved. Possession of the land was in issue. The Court stated: "Reconstruction Finance Corporation is a wholly-owned agency of the government . . . Congress could not but have intended that the Administration take possession of property declared surplus whenever it deemed that course necessary or expedient."

There was no discussion of why title had not been transferred but in any case, Shofner, a tenant whose lease had been terminated and who had no right to remain in possession under any theory,

was held not entitled to defend the possessory action by reason of a technical defect in naming the party plaintiff.

In *People ex rel Mergenthaler Linotype Co.* v. *Mills, supra,* the Secretary of War caused real property to be taken by eminent domain. After a deed from the Secretary of War to Defense Plant Corporation, the local taxing authorities assessed taxes for all years, including those during which title was in the United States. It was determined that acquisition of title by the Secretary of War was for the benefit of Defense Plant Corporation and therefore that the intention of Congress was that the property be taxable at all stages of the transaction.

At page 446, it is said:

> The delay in making the conveyance by the Secretary of War did not alter the fact that the title in the United States was held for immediate transfer to the Defense Plant Corporation, the real property of which was subject to local taxation.

Although we may agree that under these and other authorities bare or naked, legal title is not a conclusive test, we find that competent courts have held that Congress apparently intended a broad and comprehensive consent to taxation of the property of Reconstruction Finance Corporation and kindred agencies when such property is held not for governmental use but for proprietary activities.

In *Reconstruction Finance Corporation* v. *Beaver County,* 328 U.S. 204, it was held that the state court's determination as to whether fixtures constitute real or personal property is binding and conclusive. At page 209, Justice Black, speaking for a unanimous court, said:

> But Congress in permitting local taxation of the real

> property, made it impossible to apply the law with uniform tax consequences in each state and locality. . . .
>
> We think the Congressional purpose can best be accomplished by application of settled state rules as to what constitutes "real property" so long as it is plain, as it is here, that the state rules do not effect a discrimination against the government, or patently run counter to the terms of the Act. Concepts of real property are deeply rooted in state traditions, customs, habits and laws. Local tax administration is geared to those concepts. To permit the states to tax, and yet to require them to alter their long-standing practice of assessments and collections, would create the kind of confusion and resultant hampering of local tax machinery which we are certain Congress did not intend. The fact that Congress subjected Defense Plant Corporation's properties to local taxes "to the same extent according to its value as other real property is taxed" indicated an intent to integrate Congressional permission to tax with established local tax assessment and collection machinery.

The same principles are clearly applicable to the instant case and we accordingly believe that the Beaver County case extends greater encouragement to appellee than to appellant. In Beaver County it was held that Congress intended its consent to tax real property to include fixtures which the local law defined as real property. In the present case the Michigan and California Supreme Courts have, with due deliberation and not arbitrarily, held that Congress intended that taxability would continue until withdrawal of the consent to tax should be reasonably and publicly communicated to the taxing officials.

It may also be observed that the general tendency of these cases is to hold that where the property is being used for private manufacturing for profit and the tax burden has been transferred by lease to the manufacturer, the intent of Congress is that the tax is justly payable.

CONCLUSION

It is respectfully submitted that the California and Michigan Supreme Courts came to the correct decision; that Congress intended that such a tax, as here assessed, was valid. It is therefore respectfully requested, this appeal be dismissed or in the alternative that the decision of the Supreme Court of California be affirmed.

Respectfully submitted

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APPENDIX A

CONTINENTAL MOTORS CORPORATION *v.* TOWNSHIP OF MUSKEGON.

Appeal from Muskegon; Smith (Raymond L.), J., presiding. Submitted April 4, 1956. (Docket No. 18, Calendar No. 46,678.) Decided June 4, 1956.

Action by Continental Motors Corporation, a Virginia corporation, against Township of Muskegon, a constitutional body corporate, to recover taxes paid under protest. Orchard View Rural Agricultural School District No. 5, Muskegon Township, and County of Muskegon intervene as parties defendant. United States of America intervenes as party plaintiff. Judgment for defendants. Plaintiffs appeal. Affirmed.

Butzel, Eaman, Long, Gust & Kennedy (*Victor W. Klein* and *Clifford W. Van Blarcom*, of counsel) and *Joseph T. Riley*, for plaintiff Continental Motors Corporation.

Charles K. Rice, Acting Assistant Attorney General, *Lyle M. Turner*, Attorney in Department of Justice, *Wendell A. Miles*, United States Attorney, and *Robert J. Danhof*, Assistant United States Attorney, for intervening plaintiff United States of America.

Charles A. Larnard, for defendant Muskegon Township.

Robert A. Cavanaugh, for intervening defendant Muskegon County.

Street & Sorensen (*Harold M. Street*, of counsel), for intervening defendant Orchard View Rural Agricultural School District.

CARR, J. This case involves the validity of the 1953 assess-

ment, under the general property tax law* of Michigan, of certain real estate in defendant township. The facts are not in dispute. In 1943 one of the parcels of land assessed was conveyed to Defense Plant Corporation, a subsidiary of the Reconstruction Finance Corporation, and in 1945 like conveyance of the second parcel was made. The grantor named in each conveyance was Continental Aviation and Engineering Corporation, a subsidiary of the plaintiff Continental Motors Corporation. Buildings for certain manufacturing purposes were constructed on the property, and subsequently enlarged, the necessary funds therefor being furnished by the Reconstruction Finance Corporation, hereinafter referred to as the RFC.

Said real estate was thereafter for a number of years assessed for taxes by the defendant township, and payment thereof was made each year prior to 1952. During such period it does not appear that any question was raised as to the validity of the assessments, the legal title being in the RFC. Section 10 of the act creating the latter corporation, passed by congress in 1932 (47 Stat 9), † provided for the exemption from taxation of various types of obligations that might be issued thereby and also of its capital reserves and surpluses. The following provision was then incorporated in said section:

"Any real property of the corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."

Defense Plant Corporation was dissolved in 1945 and RFC, by virtue of congressional action, assumed actual control of the

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*CL 1948, § 211.1 *et seq.*, as amended (Stat Ann 1950 Rev and Stat Ann 1955 Cum Supp § 7.1 *et seq.*).

†See 15 USCA, § 607.—Reporter.

property. It is conceded that at such time, and during the prior years following conveyances to Defense Plant Corporation, the property was subject to taxation by virtue of congressional action.

In 1946, acting pursuant to the surplus property act of 1944 (58 Stat 765),* the RFC declared the plant in question to be surplus property, and undertook to surrender its possession and control, and accountability therefor, to the war assets administration. Acceptance of such custody and control was made June 1, 1948. There was no conveyance of the legal title to the last-named governmental agency.

Prior to the conveyance of the property to Defense Plant Corporation a lease was executed by said grantee to the Continental Aviation and Engineering Corporation. It appears that subsequently the latter company, a subsidiary of the Continental Motors Corporation, was dissolved and the property was thereafter occupied and used by the parent corporation. Such use and occupancy has continued to the present time. The record does not indicate that any material change in operations has taken place. A so-called agreement of lease, executed as of the 9th of June, 1942, between Defense Plant Corporation and Continental Aviation required the latter as lessee to pay "all taxes, assessments, and similar charges which at any time during the term of this lease may lawfully be taxed, assessed or imposed upon Defense Corporation or lessee with respect to or upon the site, the buildings, or the machinery, or any part thereof, or upon the occupier thereof or upon the use of the site, buildings or machinery." On the dissolution of Continental Aviation, its parent company, Continental Motors, assumed the position of lessee and thus became subject

*See notes, 50 USCA App. § 1611 *et seq.*—Reporter.

to the obligations imposed thereon.

Following the declaration that the property was surplus, and the acceptance of custody thereof by war assets administration, the RFC acting "by and through the war assets administrator," entered into a lease, as of April 1, 1949, in which it was designated as the "lessor" and Continental Motors Corporation as the "lessee." References were made therein to a contract between the United States government and the lessee providing for the manufacture of certain materials for the government, and covering the operation of the plant. Continental agreed in the lease to "pay to the properly constituted authority or authorities, as and when same may become due and payable all taxes, assessments, excises and similar charges which at any time during the term of this lease may be taxed, assessed or imposed upon lessor or lessee with respect to or upon the demised property or any part thereof, upon the occupier or operator thereof or upon the use or operation of the demised property."

Said lease purported to be for a 5-year period, but was subsequently surrendered as of November 1, 1950. At the time this action was taken custody and control of the plant had been transferred to general services administration. The instrument by which the lease was surrendered by RFC recited that it was "acting by and through the administrator of general services." Consent to such surrender was executed by Continental Motors on June 30, 1952, and by RFC on August 13th of the same year. Prior thereto the RFC acting through the general services administrator issued a so-called "interim permit" to the ordnance corps of the army, authorizing the latter to occupy and use the property in question, referred to as Plancor 166-M and also designated as the "facility," for the carrying out of its purposes. In accordance with

the plan of previous leases the ordnance corps agreed to "pay all taxes which may be levied and assessed against the facility while this permit shall be in full force and effect." The ordnance corps also assumed the obligation of introducing or causing to be introduced in congress legislation providing for the vesting of title to the facility in the United States of America. Under date of May 6, 1953, the RFC as grantor executed to the United States as grantee a deed of the property in question. Such conveyance, being subsequent to the 1st of January of said year, which date was fixed by statute as "tax day" (CL 1948, § 211.2, as amended by PA 1949, No. 285 [CLS 1954, § 211.2, Stat Ann 1950 Rev § 7.2]), does not affect the present controversy.

The property was assessed for 1953 under the general property tax law of the State to the war assets administration and Continental Motors, and/or occupant. The amount of the assessment, together with interest and collection charges, in the sum of $143,630.27 was paid under protest by Continental Motors on February 26, 1954. The present action was brought to recover said amount, on the theory that the property was exempt from taxation and that, in consequence, the assessments against it were invalid. Pursuant to orders of the trial court the United States was permitted to intervene as a party plaintiff and the county of Muskegon and Orchard View Rural Agricultural School District No. 5 as defendants.

The proofs on the trial in circuit court consisted of exhibits, many of which were received over objections. The trial judge, hearing the matter without a jury, determined the issue in favor of the defendants and judgment was entered accordingly. Plaintiffs have appealed, contending that on the 1st of January, 1953, the property in question belonged to the United States and was

immune from taxation by local authorities. Defendants rely on the claim that on the date in question the RFC was the owner of the property, that the status thereof with reference to taxation was not changed by the transfer of custody, care and accountability, to the war assets administration, effective as of June 1, 1948, and that, in consequence, it was subject to taxation in defendant township for the year 1953 in accordance with the provisions of the general property tax law of this State.

Plaintiffs herein rest their case primarily on the decision of the court of claims of the United States in *Board of County Com'rs of Sedgwick County, Kansas* v. *United States*, 105 F Supp 995, decided July 15, 1952. Said case involved claimed immunity from taxation of certain property owned by the RFC in Sedgwick county, Kansas, and leased to the Boeing Airplane Company. The suit was brought to recover taxes assessed on said property for the years 1944 to 1947, inclusive. In August, 1946, the property was declared surplus under the surplus property act of 1944, above cited. Acceptance by the war assets administration was made on April 16, 1947. Because of the provisions of the Kansas statutes relating to the collection of taxes, it was deemed necessary to make specific provision for a judicial determination of the right of the county to levy the assessments for the years in question. Accordingly the congress by Public Law No. 5, 82d Congress, 1st Sess (65 Stat 5), conferred jurisdiction on the court of claims. It was determined by said court that liability for the first 3 years of the period existed, and that the plaintiff was entitled to judgment accordingly, but that the acceptance of the property by the war assets administration in April, 1947, rendered invalid the tax for that year on the ground that following such acceptance the RFC, while owning the legal title, did not have physical possession,

control, or custody of the property, nor the right to use it. The position taken with reference to the 1947 tax is summarized in the following excerpt from the opinion (pp 1001, 1002):

"There is no indication that congress intended to waive immunity from taxation under these circumstances, if indeed the Kansas legislature intended to tax the RFC's interest in such a situation. *Cf., Lancy* v. *City of Boston,* 186 Mass 128 (71 NE 302). Such a situation could not even have arisen at the time the waiver provision was enacted, and was made possible only by the enactment of the surplus property act some 12 years later. The purpose of the waiver provision had been fully served when the property passed to the control of the WAA.

"Upon consideration of these factors we cannot presume that congress intended the waiver provision with respect to 'real property of the corporation' to extend to the lands in question after they passed to the responsibility and authority of the WAA on April 16, 1947. Thus we hold that the cloak of immunity descended upon the property on that day and no tax liability for the property could arise thereafter."

In the case at bar it is not claimed that the property occupied and used by Continental Motors was immune from taxation from the time it was conveyed to the subsidiary of the RFC until its custody, control, and accountability therefor were assumed by the war assets administration on June 1, 1948, by act of the administrator thereof. Plaintiffs insist, in line with the holding of the court in the *Sedgwick Case,* that thereafter the RFC held merely a barren legal title to the property, that the beneficial interest was in the United States, and that the waiver of the right to claim immunity from taxation, contained in the act of congress creating the RFC, was impliedly terminated. It may be argued with at least

some measure of plausibility that the RFC was merely a creature of the Federal government, created for the benefit and protection of the public interest and welfare. Unquestionably the provision of the statute making real estate held by it subject to local taxation was intended to prevent prejudice to local economic conditions. It is doubtless true that the removal of property from tax rolls may, in many instances at least, result in hardship. It may well prove embarrassing to the functioning of local governments, and result in throwing a heavy burden on taxpayers generally.

The waiver of immunity from taxation in the act creating the RFC is significant in that it involved a recognition by congress that without such waiver the property would be exempt and, further, that for the public good it should be subject to local taxation. We are not in accord with the conclusion of the court of claims in the *Sedgwick County Case* (p 1002) that the "purpose of the waiver provision had been fully served" when property owned by the RFC was transferred to the control of the war assets administration. In any event such was not the situation in the case at bar. The RFC and the war assets administration were agencies of the Federal government, through which acts deemed essential to the public welfare were accomplished. Declaring the property in question to be surplus did not operate to change the general purpose or character of its use. It continued to be occupied by Continental Motors as lessee, and that corporation continued to carry out the operations indicated by the agreements made by it with the Federal government through the latter's agencies. No reason is apparent why the waiver of immunity should have been terminated at that time. From the standpoint of local economy and well-being precisely the same reasons existed as during the prior years when it was assessed under the State law and taxes

were paid without question.

It may be assumed that in the enactment of the surplus property act congress had in mind the status of real estate belonging to the RFC. It is somewhat significant in this connection that in 1948 congress extended the scope of the original waiver in such manner as to subject real property of the RFC to special assessments for local improvements (62 Stat 261).* Such action indicated a recognition of the fact that the reasons prompting the original waiver of immunity from taxation as set out in the act of 1932, creating the RFC, still obtained. The record in the instant case fully justifies the conclusion that the sudden removal from the tax rolls of property previously subject to taxation may well result in conditions that the waiver of immunity from taxation was designed to prevent.

As noted, it is claimed by plaintiffs that following the transfer of the plant, occupied and used by Continental Motors, to the war assets administration, the RFC had, in practical effect, no further interest therein. However, acting through the administrator of the WAA it assumed to enter into a lease with Continental Motors for a 5-year period. This was followed by the so-called interim permit to the army ordnance corps in which RFC acted through the general services administration. Likewise, as lessor, it made the agreement for the cancellation and surrender of the lease of April 1, 1949. These acts took place after the property was accepted as surplus, and indicate that the governmental agencies involved in these transactions did not then consider that the RFC had at the time no actual interest in the property. The fact remains that it assumed to act, and did act, as

*See 15 USCA, § 607.—Reporter.

owner of the Continental Motors plant. The action of the agency in executing a conveyance of the property to the United States in 1953 is also significant.

In the final analysis the question at issue is whether congress clearly manifested an intent, in the enactment of the surplus property act of 1944, or otherwise, that property of the RFC, declared surplus without a transfer of the legal title, should thereupon become immune from taxation, notwithstanding the waiver in the act creating said corporation. The determination of such question may not rest in conjecture, supposition, or presumption. May it be said to appear that congress intended that the waiver of immunity should end with the acceptance of property subject to such waiver by another governmental agency assuming responsibility for its care, custody and accountability, but not vested with the title? We think it may properly be assumed that had the congress so intended it would have spoken in clear and unequivocal language. In determining this question consideration may properly be given, as above suggested, to the fact that the occupancy of the property here involved did not change and that the character of the purposes for which it was used was not altered. The agreements between Continental Motors, as occupant, and the government, through its agencies, clearly indicated a continuing situation.

The general principle recognized by the supreme court of the United States in *Rosencrans v. United States,* 165 US 257, 262 (17 S Ct 302, 41 L ed 708), may well be applied under the factual situation presented here. It was there said:

"In other words, where congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in

such subsequent legislation. Especially is this rule to control when it appears that congress in some cases has made express provisions for effecting a change."

By analogy, the opinion in *Reconstruction Finance Corporation* v. *Beaver County*, 328 US 204 (66 S Ct 992, 90 L ed 1172), suggests the general policy of congress with reference to matters affecting taxation of property by local governmental units. Likewise, in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 US 349, 351 (61 S Ct 580, 85 L ed 881), it was said:

"But bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our Federal scheme must always be in the background, we ought not to find in section 5* radiations beyond the obvious meaning of language unless otherwise the purpose of the act would be defeated. *Minnesota Rate Cases*, 230 US 352, 398-412 (33 S Ct 729, 57 L ed 1511, 48 LRA NS 1151, Ann Cas 1916A, 18)."

The general principles recognized in these and other decisions may well be considered in determining the interpretation to be placed on the surplus property act of 1944. We are not persuaded that congress manifested therein any intent that the transfer of real estate from one public agency to another, without a change in title and ownership, or in actual use and occupancy by the lessee, should automatically terminate a waiver of immunity from taxation as to such property.

In addition to the *Sedgwick County Case*, *supra*, counsel for plaintiffs rely on other decisions, none of which involved a dispute of the character presented in the instant case. In *United States* v.

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*Reference is to section 5 of Federal trade commission act, 38 Stat 719, as amended, 15 USCA § 45.—Reporter.

County of Allegheny, 322 US 174 (64 S Ct 908, 88 L ed 1209), the question at issue was the right to tax under State law property belonging to the government of the United States and as to which immunity from taxation had never been waived. In *S.R.A., Inc.*, v. *Minnesota*, 327 US 558 (66 S Ct 749, 90 L ed 851), State authorities sought to tax land that in previous years had been conveyed to the United States as a site for a post office and other Federal offices and agencies. The property was eventually vacated by the government and was sold under an act of congress authorizing such action. The purchaser took possession, with right of user, under a contract of sale which provided for retention of the legal title by the government for purposes of security until the amount of the purchase price had been paid in full. The assessment was made subject to the title remaining in the United States. Under the circumstances it was held that the tax was valid.

United States v. *Shofner Iron & Steel Works* (CCA), 168 F2d 286, did not involve the taxation of property. It was an action by the United States government to recover possession of real property located in the State of Oregon which had been taken over by RFC on the dissolution of Defense Plant Corporation in 1945. The question was whether the United States was the real party in interest. The appellate court pointed out that the RFC was a wholly-owned agency of the government, and that it held legal title for the use of the United States and subject to the authority of the latter in its disposition. As in the case at bar, said property had been declared surplus under the act of congress of 1944. The right to maintain the possessory action was sustained.

In *Johns Hopkins University* v. *Board of County Commissioners of Montgomery County*, 185 Md 614 (45 A2d 747), it was held that property acquired by the plaintiff university under con-

tract with the United States for the purpose of erecting a research plant for the government, plaintiff being bound by contract to convey the property to the government or to a grantee designated by it, was immune from State taxation because of the Federal government's interest therein. In this case, as in other cases above noted, there was involved no express waiver by congress of immunity from taxation by local governmental units, or the implied termination or withdrawal of such waiver.

Plaintiffs also direct attention to the fact that congress, in 1955, by Public Law No 388, chapter 874 (69 Stat 721),* retroactive in effect as of January 1, 1955, sought to afford relief to certain municipalities economically affected by the removal from the assessment rolls of property previously subject to taxation. Apparently such action is claimed to indicate the interpretation that should be placed on the surplus property act adopted by congress in 1944. However, the intention of congress in the enactment of the earlier statute may not properly be determined by reference to a subsequent act passed several years later. The report submitted with said measure clearly indicated the feeling on the part of the committee that the decision in the *Sedgwick County Case*, and the subsequent action of certain governmental agencies and departments following such decision, rendered expedient and desirable action of the character suggested, namely, the relief of local municipalities. We do not think that this action, as explained by the report (US Code Congressional and Administrative News, 84th Congress, First Session, 1955, p 3114 *et seq.*), or prior legislation of a similar character, may be regarded as establishing that congress intended real estate expressly subjected to local taxation

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*See 40 USCA 1955 Supp § 321 *et seq.*—Reporter.

by virtue of the act creating the RFC should acquire immunity by a mere transfer of possession, custody and accountability, to another Federal agency. Furthermore, the legislation to which plaintiffs direct attention indicates conclusively a general purpose on the part of the congress to protect the economy of local municipalities and to prevent the placing of undue hardships thereon. Such purpose is at variance with the claim that in the adoption of the surplus property act it was intended to terminate the waiver of immunity from taxation with which we are here concerned.

The waiver of immunity from taxation involved in the instant case came into being by express action of congress. It is, we think, inconceivable that that body contemplated the revocation of such waiver by mere implication. The matter was one of prime importance economically to the government of the United States and to local governments as well. Had congress intended the result claimed by plaintiffs in the present case, and held by the court of claims in the *Sedgwick Case, supra,* we believe that it would have spoken accordingly in clear and unequivocal terms. In the absence of an expression of such intent it is our conclusion that the taxes in question here were properly assessed. The factual situation does not require, or permit, a finding that the waiver of immunity from taxation was impliedly withdrawn by the enactment of the surplus property act.

The trial court was not in error in entering judgment in favor of the defendants. That judgment is affirmed.

DETHMERS, C. J., and SHARPE, SMITH, BOYLES, KELLY, and BLACK, JJ., concurred.

The late Justice REID took no part in the decision of this case.

APPENDIX B

Excerpt from Hearings on H.R. 6182 before House Committee on Government Operations, 84th Cong., 1st Sess., pp. 126-127.

The CHAIRMAN. Did you recapture the money paid, take steps to repossess the money paid?

Mr. POORMAN. Sir, I think that a letter that I would like to read into the record, signed by Mr. Larson, previous Administrator of General Services Administration, dated January 14, 1953, would explain that situation:

DEAR MR. HOFFMAN: I desire to inform you of my determination to effect a change in the policy hereafter to be observed by General Services Administration in the matter of payments of sums in lieu of taxes on surplus property in those cases in which record title to the property remains in the name of Reconstruction Finance Corporation.

It has heretofore been the policy and practice of both this Administration and War Assets Administration, to whose functions in the disposal of surplus property this Administration succeeded, to make payments of sums in lieu of taxes accruing against real property, declared surplus by Government corporations under the Surplus Property Act of 1944, where legal title to such property remained in the Government corporation. In those instances in which such property has been leased to private industry or persons, the lessees uniformly have been required to pay directly to the local taxing authorities all taxes assessed against the property.

The adoption of such policy was based upon the belief that, so long as record title to the property remained in Reconstruction

Finance Corporation, it was legally subject to local taxation, despite the fact that the property had been declared surplus to the needs and responsibilities of Reconstruction Finance Corporation. It is true that record title might have been transferred from Reconstruction Finance Corporation to the United States of America, and that such transfer unquestionably would have released the property from liability for local taxes. If such transfers were made, however, the effect thereof would have been to remove hundreds of plants from State tax rolls many of which were leased to tenants who were paying the taxes, and who would continue to do so as long as the record title stood in the name of Reconstruction Finance Corporation. Congress approved the policy established by war Assets Administration, of not taking those properties off the tax rolls by authorizing War Assets Administration to pay sums in lieu of taxes on such properties, and as late as September 5, 1950 (see sec. 210 (a) (6), Public Law 152, 81st Cong., as amended by sec. 5, Public Law 754, 81st Cong.), it continued that approval by authorizing the General Services Administration to pay sums in lieu of taxes on property declared surplus by Government corporations under the provisions of the Surplus Property Act of 1944, where legal title thereto remained in such Government corporations.

As was pointed out in the preceding paragraph, the policy adopted by War Assets Administration in the matter of making payments of sums in lieu of taxes was founded upon the belief and assumption that taxes might be lawfully levied against the property. A recent decision in the United States Court of Claims held that no liability for local taxes could attach to property which had been declared surplus by Reconstruction Finance Corporation after the date of acceptance of accountability for such property

by the disposal agency. The decision was rendered in the case of *The Board of Commissioners of Sedgwick County, State of Kansas* v. *The United States,* case No. 50117 decided July 15, 1952, which was tried before the Court of Claims pursuant to special authority contained in the provisions of Public Law 5, 82d Congress, approved March 19, 1951. The case involved a claim by the county of Sedgwick for taxes assessed against real property record title to which was held in the name of Reconstruction Finance Corporation, but which had been declared surplus to War Assets Administration under the Surplus Property Act of 1944. The court held that taxes were properly chargeable against the property during the period it was held by Reconstruction Finance Corporation in the performance of the duties and responsibilities imposed upon the Corporation by law, but that it was not subject to taxes after it had been declared surplus to the needs and responsibilities of the Corporation and accountability therefor had been accepted by War Assets Administration. Judgment was ordered in favor of the county for the unpaid taxes assessed and levied during the years that the property was held by the Corporation in the performance of its statutory responsibilities, but no relief was granted the county for any taxes accruing after the date of acceptance of accountability by War Assets Administration under the declaration of surplus.

The decision of the court in this case has in effect invalidated the assumption upon which the policy providing for payment of sums in lieu of taxes was based, and I therefore feel obliged to effect a change in such policy. This decision has been arrived at notwithstanding there may be some question as to the general applicability of the decision of the Court of Claims in this case, because of the special nature of the proceedings and the fact that

the decision is based in part upon a construction and interpretation of the constitution and statutes of the State of Kansas.

Accordingly, effective immediately, the policy of this Administration will be to refrain from paying any taxes or sums in lieu of taxes, or requiring any other Government agency to make such payments, accruing after the date of acceptance of accountability by War Assets Administration in cases of real property declared surplus by Reconstruction Finance Corporation under the Surplus Property Act of 1944, even though legal title to such property may remain in said Corporation. This Administration will, however, in those cases in which property of this kind is leased to private parties, continue, so far as possible, to require such private parties, as lessees, to pay all taxes which may be levied or assessed against the property during the leasehold period, or sums in lieu thereof, in order that the lessees may not gain a windfall by virtue of the fact that rentals were established in the light of the lessee's undertaking to pay taxes.

The CHAIRMAN. What about the case where you charge your lessee the amount of taxes you collected?

Mr. POORMAN. I would like to have Mr. Peyton answer that. I might say, in passing, that that reverts to the Federal Treasury. The General Services Administration makes no gain from the proposition.

Mr. PEYTON. The provision to require a lessee to pay the sum equivalent to taxes after we were prohibited from their being paid to the community, as Mr. Poorman said, the miscellaneous receipts going to the Treasury Department, it was done to prevent a lessee getting a break against a competitor next door, operating

a private business and paying local taxes, and competing and bidding on the same contracts.

The CHAIRMAN. I think that was properly done.

Mr. PEYTON. And as a matter of fact, we had many instances where private plant owners inquired as to whether or not their competitors were paying taxes to the Government or—and in some instances, rather indicated that they felt they must be getting a windfall, because they were beating them out in competition.

Well, we have tried to maintain that policy. Now, at the time of the Sedgwick County case—and I might add, that following that, we asked the Comptroller General for an opinion as to whether the Kansas statute would be applicable in general, and in October we got an opinion which even went further, it seems to me, than the Court of Claims' opinion, in that he ruled that the property was immune from taxes from the date the property was declared excess to the needs of Reconstruction Finance Corporation, but not necessarily surplus to the needs of the Government. So, at that time, we had leases in effect—

Mr. MEADER. Might I interrupt at that point, Mr. Peyton?

Mr. PEYTON. Yes.

Mr. MEADER. That would mean, would it not, that the minute Reconstruction Finance Corporation declared the property excess, even though it still had custody, control and accountability until it had been accepted by some other agency within the Government, the property was immune from taxation?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 295

ROHR AIRCRAFT CORPORATION,
a California Corporation,
Appellant,

vs.

COUNTY OF SAN DIEGO, a Body Corporate, and CITY OF CHULA VISTA, a Municipal Corporation,
Appellees.

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I.

STATEMENT OF THE CASE

Appellees have, in their brief, pointed to certain portions of Appellant's statement as containing inaccuracies. Appellant has always maintained that War Assets Administration (and thereafter General Services Administration) had possession and control of the property taxed under and by virtue of the express provi-

sions of the Surplus Property Act of 1944. Appellees take issue upon the theory that, after the execution of the lease to Appellant's predecessor on September 1, 1949, War Assets had no longer any possession or control. Rather, they claim that RFC continued as owner and lessor. Appellees make this assertion as one of fact. Their statement is, however, more one of legal conclusion, and we believe as such, erroneous. The question is not whether Appellant had physical possession of the premises under the terms of its lease, but rather, as between RFC and War Assets Administration, who had the legal responsibility for the property? Appellees state that the lease, by its terms, was one from RFC. In this, they blissfully ignore the express provisions of the Surplus Property Act of 1944 and the very terms of the lease itself (R. 9-30).

When the entire circumstances are analyzed in the light of the express provisions of the Surplus Property Act and the rules and regulations issued under its provisions, it becomes apparent that the entire responsibility for the property from the standpoint of the United States, its possession in the United States, as lessor, and its control as lessor was vested in War Assets and General Services Administration, and not in RFC.

II.

ARGUMENT

A. JURISDICTION. Appellees argue at some length that this cause is not properly here on appeal. However, Appellant respectfully submits that there has here been "drawn in question the validity of a statute . . . on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the

decision is in favor of its validity."

This Court has many times defined the meaning of a statute as including every legislative action to which a state gives the force of law. The validity of a statute has been held to have been sustained, within the meaning of Subdivision (2) of Title 28, U.S.C., Section 1257, when the state court has held the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co. v. Bondurant* (257 U.S. 282, 42 S. Ct. 106, 66 L. Ed. 239). Appellees have cited and relied on *Jett Brothers Distilling Co. v. City of Carrollton* (252 U.S. 1, 40 S. Ct. 255, 64 L. Ed. 421). The line between the *Jett* case and the doctrine enunciated in *Dahnke-Walker* has not always been cleanly hewn. Compare *Indian Territory Illuminating Oil Co. v. Board of Equalization* (288 U.S. 325, 53 S. Ct. 388, 77 L. Ed. 812) and *Jaybird Mining Co. v. Weir* (271 U.S. 609, 46 S. Ct. 592, 70 L. Ed. 1112). In the *Indian Territory* case, the tax officials levied a tax on oil produced under a lease of restricted Indian lands, which had been mingled with other oil concededly taxable. The royalty due the Indians had already been paid. The *Jaybird* case involved an assessment on ore mined on Indian lands and held in bins on the tax day. In both cases, the same law was involved, the same process of assessment was carried out, and the same plea of immunity of a governmental instrumentality was raised. Yet, in the *Jaybird* case, a Writ of Error was allowed, while in the *Indian Territory* case, the Court dismissed the appeal, although, it granted a petition for certiorari.

Appellees also cite and rely upon the case of *Wilson v. Cook* (327 U.S. 474, 66 S. Ct. 663, 90 L. Ed. 793). This case was argued in January of 1946, and was decided in March of that year. It

involved a severance tax of Arkansas which was imposed upon private persons who, by contract, had cut timber on national forest reserves owned by the United States and located in Arkansas. Appellant has cited and relied on *Reconstruction Finance Corporation* v. *Beaver County* (328 U.S. 204, 66 S. Ct. 992, 90 L. Ed. 1172). The *Beaver County* case was argued in April of 1946, and decided in May. It involved the application of the Pennsylvania taxing statutes to fixtures owned by RFC, which had been taxed by Pennsylvania as real estate. In both cases, the question of intergovernmental tax immunity was raised in the state courts, and in both cases, the state taxing statutes were upheld by the state court. Yet, in *Wilson* v. *Cook*, the appeal was denied, while in the *Beaver County* case, the procedural remedy was sustained as proper. In *Wilson* v. *Cook*, the Court stated:

> "*As the record does not show that the plaintiffs presented for decision to the state Supreme Court any federal question*, they have no appeal to this Court unless the opinion of the state Supreme Court shows that that court ruled on the validity of a state statute under the laws and Constitution of the United States. . . ." (Emphasis supplied).

Here, as in *Beaver County*, the entire question considered by the trial court, the District Court of Appeal, and the California Supreme Court was whether the real property here taxed was that of RFC or belonged to the United States, and whether the California taxing statutes could be constitutionally applied (Juris. St., 19-52).

If this Court should determine that the case here is not properly before it on appeal, and chooses to apply the *Jett Brothers* principle rather than that followed in *Beaver County*, Appellant

respectfully submits that the papers on this appeal should be regarded and acted on as a petition for Writ of Certiorari, in accordance with Section 2103, Title 28, U.S.C. Clearly, the California Supreme Court has here decided a federal question of substance, not heretofore determined by this Court; or, has decided it in a way which is probably not in accord with the applicable decisions of this Court (Rule 19).

B. THE WAIVER OF FEDERAL CONSTITUTIONAL IMMUNITY FROM TAXATION IS A CONGRESSIONAL MATTER. Appellees rely to a great degree upon the administrative practice of the Administrator of War Assets and the General Services Administrator, in leaving legal title in RFC, as extending the scope of the waiver enacted in 1932 with respect to property of that corporation. They contend that, because of this administrative practice, indulged in prior to the decision of the Court of Claims, in *Board of County Commissioners of Sedgwick County, Kansas v. United States* (105 Fed. Supp. 955), the intent of Congress must have been to continue the waiver, even after true ownership of the property was transferred out of RFC by that corporation's own voluntary act. This Court has, however, many times indicated that adjustments of intergovernmental tax immunity are strictly legislative matters. Thus, in *United States v. City of Detroit* (355 U.S. 466, 474; 78 S. Ct. 474; 2 L. Ed. 2d 424), it was stated: "Wise and flexible adjustments of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve." And again, in *City of Detroit v. Murray Corp.* (355 U.S. 489, 495; 78 S. Ct. 458; 2 L. Ed. 2d 441): "(T)he Congress is the proper agency.

as we point out in *United States v. City of Detroit*, to make the difficult policy decisions necessarily involved in determining whether and to what extent private parties who do business with the Government should be given immunity from state taxes." Furthermore, Congressional intent cannot be shown by an erroneous administrative practice. *Sanford's Estate v. Commissioner*, 308 U.S. 39, 60 S. Ct. 51, 84 L. Ed. 20.

Appellees also argue that the enactment by Congress, in 1955, of Public Law 388 indicates an intent on the part of Congress that the waiver provisions contained in the RFC Act should be here applicable (Public Law 388, 69 Stat. 722, 40 U.S.C. 521-524.) A careful examination and consideration of this enactment discloses, we believe, quite the contrary. In Section 521 of the Act, Congressional policy is stated as follows:

> "The Congress recognizes that the transfer of real property having a taxable status from the Reconstruction Finance Corporation or any of its subsidiaries to another Government department has often operated to remove such property from the tax rolls of States and local taxing authorities, thereby creating an undue and unexpected burden upon such States and local taxing authorities, and causing disruption of their operations. It is the purpose of this subchapter to furnish temporary measures of relief for such States and local taxing authorities by providing that payments in lieu of taxes shall be made with respect to such property so transferred on or after January 1, 1946."

By Section 524 of the Act, its effect is limited as follows:

> "(c) Nothing contained in this subchapter shall establish any liability of any Government department for the payment of any payment in lieu of taxes with respect to any real property for any period before January 1, 1955, . . ."

It is apparent from the Committee reports and the record of proceedings in Congress while Public Law 388 was being considered that Congress was quite mindful of the effect which the Court of Claims' decision in the *Sedgwick County* case had upon the waiver statute. If the intent of Congress had always been that the waiver statute should be applicable with respect to property formerly belonging to RFC, and which had been declared surplus by it, it would have been an easy matter for the Congress to have so provided in Public Law 388. This it did not do, despite the arguments noted by Appellees which were made by Congressman MacDonald. Instead, the Congress expressly provided that the payments authorized by Public Law 388 were not to be made with respect to any property transferred (as defined in Sec. 522 (f)) from RFC under the Surplus Property Act for the period prior to January 1, 1955.

C. TAXATION OR EXEMPTION DEPENDS NOT UPON LEGAL TITLE, BUT RATHER ON THE STATUS OF THE OWNER OF THE BENEFICIAL INTEREST IN THE PROPERTY. Appellees, in their brief, repeatedly state that local taxing authorities are to determine who is to be assessed, and that they must, perforce, depend upon record title. In so doing, Appellees ignore the real question. We are here concerned with property admittedly owned by the United States. It had been acquired by the Defense Plant Corporation and, pursuant to Congressional Act, transferred to RFC. Absent the waiver provisions of the RFC Act, the property would, admittedly, be immune from state and local taxes. By the RFC Act, Congress had provided that property "of the Corporation" could be taxed. The real question, then, is whether, under the circumstances here present,

this property is still that of RFC. In *American Motors Corp. v. City of Kenosha* (274 Wis. 315, 80 N. W. 2d 363), a contractor with the United States brought an action against the city to recover personal property taxes paid under protest. The taxes had been levied upon certain parts and materials acquired for performance of the contract with the United States. The contract documents provided that title to such parts and materials became vested in the United States. The Supreme Court of Wisconsin examined all details of the contract documents and the dealings between the contractor and the United States with respect to the property taxed. It concluded that, notwithstanding the fact that legal title to the property was in the Government, yet such ownership or naked legal title did not preclude the city from taxing. The court held that true ownership of the property was in the company, and the assessments were therefore valid. The contractor and the United States, which had intervened, appealed to this Court. The decision of the Wisconsin Supreme Court was affirmed *per curiam*, without opinion (356 U. S. 21, 78 S. Ct. 559, 2 L. Ed. 2d 578).

Counsel for Appellees state, at page 24 of their brief:

> "Although we may agree that under these and other authorities bare or naked, legal title is not a conclusive test, we find that competent courts have held that Congress apparently intended a broad and comprehensive consent to taxation of the property of Reconstruction Finance Corporation and kindred agencies when such property is held not for governmental use but for proprietary activities."

Yet here, Appellees misconceive the nature of our national Government. The distinction between governmental and proprietary activities applied in a variety of instances with relation to the

functions of local government has not been, so far as we are aware, the fulcrum on which taxability or immunity has rested. Indeed, it has always been recognized that the United States in whatever it does acts in a governmental capacity. Thus, in *Graves v. New York ex rel. O'Keefe* (306 U. S. 466, 59 S Ct. 595, 83 L. Ed. 927), this Court, in considering the nature of the Home Owners' Loan Corporation, stated:

> "For the purposes of this case we may assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the federal government. . . . As that government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. . . . And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments. . . ."

If Appellees are urging this Court to graft an exemption upon the principle of *M'Culloch v. The State of Maryland* (4 Wheat. 316, 4 L. Ed. 579), arising out of a business purpose, they are urging this Court to overthrow and discard principles of inter-governmental relationship which have been so long established and adhered to that they can be classed as fundamental. Indeed, if this be their assertion, their broom and sweep are broad, but the straws of the broom, sparse.

In their brief, Appellees have considered the decision of the Court of Claims in the *Sedgwick County* case as being predicated

upon direct ownership of the United States, through the Department of the Air Force (Brief of Appellants, pps. 4 and 20). In so doing, they have misread and misconstrued both the facts and the opinion in that case. The court's statement of the facts involved is this:

> "The property involved in this action was acquired in 1942 by the Defense Plant Corporation, a wholly-owned subsidiary of the Reconstruction Finance Corporation. Shortly after its acquisition a plant for the manufacture of B-29 bomber type airplanes was constructed on the premises and the property was leased to the Boeing Airplane Company.
>
> "Effective July 1, 1945, the Defense Plant Corporation was liquidated, and the property in question, together with the other assets, rights, and liabilities of the Defense Plant Corporation, were transferred to the Reconstruction Finance Corporation, pursuant to Joint Resolution of Congress, 59 Stat. 310, 15 U. S. C. A. § 611 note. On August 31, 1946, the RFC declared the property surplus, under the Surplus Property Act of 1944, 58 Stat. 765, 50 U. S. C. A. Appendix, § 1611 et seq. Acting under the same act the War Assets Administration accepted responsibility and authority for the property on April 16, 1947. From that date forward the RFC had neither physical possession, control, or custody of the property, nor the right to use the premises.
>
> "No disposition of the property was made by the WAA until February 25, 1948, when the War Assets Administration, acting on behalf of the RFC, executed a deed to the property to the United States. Custody and accountability of the property was thereupon transferred to the Department of the Air Force. . . ."

It is to be noted that the sole question involved taxes for the years 1944 through 1948. The deed to the Department of the Air Force from the War Assets Administration (not RFC, in whose

name legal title reposed), was not made until February 25, 1948. The decision of the Court of Claims that the property was immune from local tax, and not subject to the waiver provisions of the RFC Act, related to the taxes which would otherwise have been payable for the year 1947. During this year, legal title was in RFC, possession and control in War Assets Administration, and the property was under lease to Boeing Aircraft Corporation. If this Court is to affirm the decision of the California Supreme Court, below, it must in effect overrule and disregard the position taken by the Court of Claims.

D. IF TAX IMMUNITY OF PROPERTY IN THE HANDS OF WAA, FOLLOWING A DECLARATION AS SURPLUS BY RFC, IS NOT RECOGNIZED, A DISCRIMINATORY TAX WOULD RESULT. Appellees argue that this Court should so construe the waiver provisions of the RFC Act, the express mandates and directions of the Surplus Property Act of 1944, and the various administrative policies so as to preserve the right of local governments to tax property declared surplus following its transfer from RFC, upon the ground that such a construction is both proper and necessary to prevent a windfall to private lessees. Thus, it is stated at Page 21 of Appellees' brief: ". . . the Congress at no time intended that a windfall would be given to private corporations by placing them in a position where they were free of tax." A casual reader of Appellees' brief might well wonder as to their concept of the motivating factors behind Congressional consent to local taxation. Is it concern for the welfare of local governmental agencies, or a desire to protect the economic position of private individuals? Appellees' argument here overlooks the fact that California has long taxed the interests

of private lessees under leases of real properties and improvements otherwise exempt from tax. Under California law, the right of a lessee and the full value of his possessory interest under a lease in publicly-owned property which is tax exempt is an interest which is taxable: [illegible]

Texas Co. v. County of Los Angeles, 52 Cal. 2d 55, 338 P. 2d 440

De Luz Homes, Inc. v. County of San Diego, 45 Cal. 2d 546, 290 P. 2d 544

L. W. Blinn Lumber Co. v. County of Los Angeles, 216 Cal. 474, 14 P. 2d 512

Hammond Lumber Co. v. County of Los Angeles, 104 Cal. App. 235, 285 Pac. 896

Indeed, in this very case, both Appellants by their answers filed in the trial court, reserved the right to an equitable offset as against any refund which might accrue to Appellee if its position were sustained. [illegible] If, during the tax years here involved, the property is considered exempt, Appellee would pay [illegible] it would have paid had it occupied any other tax-exempt property in the State of California. [illegible]

In *Phillips Chemical Company v. Dumas Independent School District*, decided by this Court on February 23, 1960 (Docket No. 40, October Term, 1959, ___ U. S. ___, 28 U. S. Law Week 4140), the Court had before it on appeal a Texas tax statute under which lands and improvements which were held, owned, used, or occupied by the United States were taxed to the extent that any portion thereof was used and occupied by any person, firm, or corporation in its private capacity, or which was being used or occupied in the conduct of any private business or enterprise. This statute was held to be discriminatory in an opinion written by Mr. Chief Justice Warren. The basis for the decision was that, under the Texas statutes, a heavier tax burden was imposed on lessees of federal property than was imposed on lessees of other exempt public property in the State of Texas. It is submitted that, if the property here taxed by California is held to be exempt, no windfall will result to Appellant. It will merely be afforded the same tax treatment as is afforded other lessees of exempt properties. Furthermore, as has been repeatedly pointed out in Appellant's opening brief and in the brief of the United States, as *amicus curiae*, the statutes here complained of and the taxes here involved are ad valorem taxes levied directly upon the property of the United States.

CONCLUSION

Time and again, this Court has eschewed reliance on "empty formalisms." Yet that is what Appellees are here urging. Summarized, their position is that record legal title was still in RFC, and, therefore, the property was still the property of RFC, despite the fact that full, beneficial, and equitable ownership of the pro-

perty was in the United States.

It is respectfully submitted that here, as in *Beaver County*, the validity of state statutes has been drawn into question, as against the contention that, as applied, they are invalid on federal grounds. The California Supreme Court has upheld the state statutes in the face of such contention, and in so doing, has decided a federal question of substance, not heretofore determined by this Court, and also, in a manner probably not in accord with applicable decisions of this Court. Whether on appeal or by certiorari, the decision of the California Supreme Court should be reversed, and the cause remanded to the court below, with instructions that judgment be entered in favor of Appellant for the amount determined in accordance with the stipulation of the parties respecting Appellant's possessory interest.

Respectfully submitted,

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